

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

EMMA C., et al,)
)
)
 Plaintiffs,)
)
 vs.) No. C 96-4179 VC
)
 TOM TORLAKSON, et al,)
) San Francisco, California
 Defendants.) Friday
) May 31, 2019
) 9:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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KRISTIN WRIGHT

STACEY WEDIN

SUSAN WAGNER

— — —

FRIDAY - MAY 31, 2019

9:41 A.M.

P R O C E E D I N G S

THE CLERK: Now calling Case 96 CV 4179,
Emma C. et al versus Thurmond, et al.

THE COURT: Does somebody want to make their
appearances?

MR. SPENCE: Good morning, Your Honor.
Darrell Spence on behalf of the California Department of
Education, the State Board of Education, and the Superintendent
of Public Instruction.

THE COURT: All right.

MS. GILL: Good morning, Your Honor. Deputy Attorney
General Kirin Gill for the State defendants.

THE COURT: Good morning.

MS. ARMSBY: Good morning, Your Honor. Aimee Armsby,
Deputy County Counsel, for the Ravenswood School District and
for related defendants.

THE COURT: All right.

MR. KOSKI: Good morning, Your Honor. Youth and
Education Law Project, my name is Bill Koski and we're with the
plaintiffs.

THE COURT: All right.

MS. WELCH: Good morning, Your Honor. Leecia Welch
for the plaintiffs.

MS. PITTS: Good morning, Your Honor. Freya Pitts

1 also for the plaintiffs.

2 **THE COURT:** Good morning.

3 And good morning to the policymakers.

4 **MR. SPENCE:** And, your Honor?

5 **THE COURT:** Yes.

6 **MR. SPENCE:** May I be heard?

7 **THE COURT:** Oh, yes.

8 **MR. SPENCE:** Ms. Greenwood is not here. You might be
9 able to tell. We have Stacey Wedin in her place. And
10 Ms. Wright can explain a little bit of the background,
11 foundation about what that is and who she is.

12 **THE COURT:** Go ahead.

13 **MS. WRIGHT:** Good morning. So Allison Greenwood will
14 not be working on this particular case anymore. She will still
15 be working for the department, but for health reasons she is
16 stepping away from the case.

17 And we have Stacey Wedin, who is a policy consultant in
18 the director's office in the Special Ed Division, who has a
19 deep history and knowledge of not only this case but of special
20 education and our processes in general, so I think she will be
21 an added bonus to this case.

22 **THE COURT:** Okay. Great.

23 **MR. SPENCE:** And Ms. Wright, to be clear,
24 Ms. Greenwood is not just stepping from the case; is that
25 correct?

1 **MS. WRIGHT:** Yes. She's actually stepping down
2 from -- she's currently in an ed admin position with the
3 department. She's going to be working in a consultant position
4 so that she can take more time for her own personal health.

5 **THE COURT:** Please give her my best.

6 **MS. WRIGHT:** Thank you.

7 **THE COURT:** Is it "Wedin"?

8 **MS. WEDIN:** Wedin, yes.

9 **THE COURT:** Welcome to the party.

10 Okay. Well, I think we should probably proceed more or
11 less in the format that we've proceeded in past hearings with
12 Mark presenting his findings and me likely peppering you with
13 questions while you're presenting your findings, and then we
14 can hear any response from the policymakers that you want to
15 give.

16 So go ahead, Mark.

17 **MR. MLAWER:** Good morning, everyone. Let me
18 introduce Dr. Susan Wagner, who is sitting at this desk over
19 here, to everyone.

20 Okay. Starting with comprehensive review selection. We
21 approach this, and the first table on my Page 2 shows the
22 distribution of these districts based on CDE's comprehensive
23 review selection formula. So we broke it out into brackets.
24 You have scoring below 62 percent and selected. Scoring below
25 that level and not selected. 62 to 64.99. 65 to 69.99.

1 70 plus. And those districts that were not scored by CDE.

2 **THE COURT:** I'm sorry to interrupt so quickly, but
3 the question that jumped out at me when I read this was I
4 couldn't remember there being a category of districts that fell
5 below 62 percent on the score for comprehensive review
6 monitoring that didn't actually get -- weren't actually
7 selected for comprehensive review monitoring. So I was
8 confused by that grouping to begin with.

9 So what do we know and what do we not know about that
10 grouping? Where does that come from?

11 **MR. MLAWER:** CDE has stated in its February response
12 that those 69 districts were first year charter schools.
13 However, some of them have dashboard scores, which -- and to
14 get a dashboard score you need to score the prior year.

15 So that doesn't make full sense to me, so if I can turn to
16 the CDE staff and hear your response to that.

17 **MS. DUNCAN-BECERRIL:** Sure.

18 So the way that we calculate data based on information for
19 charter schools is based on what's called a County District
20 School code. That County District School code is assigned to
21 districts and charter schools when they apply to be a school.

22 Now, one of the things that happen is districts will get a
23 new CDS code when there is a change --

24 **THE COURT:** A new what code?

25 **MS. DUNCAN-BECERRIL:** County District School code.

1 **THE COURT:** Got it.

2 **MS. DUNCAN-BECERRIL:** So, for example, there are
3 seven Washington Unified School Districts in California. So we
4 can't use the name Washington Unified to differentiate them.
5 What we use instead is the -- is a code that's assigned to
6 them. It's a seven-digit code.

7 Now, that code can change from year to year if there are
8 significant changes to the school itself.

9 For example, they add additional grades or they split
10 apart or they combine. So if it was two schools and they
11 combine into one, then they get a new school code.

12 So the way that we look at it for students with
13 disabilities is they report to us what the school code is and
14 we match it to that data for that school code, and if it
15 changes, then we don't have data for the previous year for
16 them.

17 So that's why you would have districts who would be first
18 year charter schools who may have had data on the dashboard
19 that was based on a different population the previous year.

20 So, for example, an elementary school charter would become
21 a K-8 charter or a K-12 charter, but the previous year's
22 dashboard would have been based on K-6.

23 **THE COURT:** Okay. So these 69 districts that are
24 listed here as below 62 percent, 62 percent is the score --
25 that's the cutoff for the score that gets you into

1 comprehensive monitoring.

2 **MS. DUNCAN-BECERRIL:** That is correct.

3 **THE COURT:** And it was 65, and then you -- when you
4 ran it at 65, that gave you too many districts and you didn't
5 have the resources to subject all those districts to
6 comprehensive monitoring, so you lowered the score to 62.

7 **MS. DUNCAN-BECERRIL:** That is correct.

8 **THE COURT:** Okay. But then there are still these
9 69 districts that got a score below 62 that didn't get put into
10 comprehensive monitoring. And that was the part that confused
11 me. I didn't remember that. It may be that I have been doing
12 too much other stuff between the last time we met and now, but
13 when I saw that, I said, wait a minute.

14 I didn't know that there were school -- that there were
15 districts that got a score of below 62 percent and didn't get
16 put into comprehensive monitoring. So who are those districts?

17 **MS. DUNCAN-BECERRIL:** They are all charter schools.
18 And they would have not been charter schools that were acting
19 as a district last year. So one thing to keep in mind --

20 **THE COURT:** But then how did they get a score of
21 below 62 percent?

22 **MS. DUNCAN-BECERRIL:** Because they had dashboard
23 data. So every school and district -- so my son's school,
24 Natomas Park Elementary, it gets a dashboard. But it's part of
25 a district, Natomas Unified. And so the district gets a

1 dashboard that includes Natomas Park Elementary, but Natomas
2 Park Elementary also gets a dashboard.

3 When we moved to -- when we moved to breaking out all
4 charters, which happened in 2019, '20 -- I believe we spoke
5 about this. I don't know if you want me to repeat it.

6 **THE COURT:** I remember that you -- I remember the
7 whole concept of breaking them out.

8 **MS. DUNCAN-BECERRIL:** So we broke out all these
9 charters, and in special education data the previous year, they
10 were all included with their authorizer. So we didn't break
11 out and recalculate. That's why they didn't have enough data
12 in the previous year's data.

13 **THE COURT:** So is the upshot, then, that in your --
14 in your system, those 69 schools are classified as having a
15 score below 62 percent, but that's actually meaningless because
16 it involves a comparison to a dashboard from the prior year
17 that reflects the entire district rather than the charter
18 school?

19 **MS. WRIGHT:** Well, the special education data would
20 have been included inside of the district data the previous
21 year and not broken out for that charter school. They didn't
22 have previous year charter school special education data for
23 least restrictive environment, least restrictive environment
24 for preschoolers, assessment for preschoolers.

25 **THE COURT:** The only thing I'm -- the thing I'm

1 trying to figure out is why, then, do they have a score of
2 below 62 percent?

3 **MS. DUNCAN-BECERRIL:** Because the score was based
4 solely on the three charter school elements, the three -- I'm
5 sorry -- dashboard elements. Because as a school, they had a
6 dashboard last year.

7 **THE COURT:** As a school, they had a dashboard last
8 year?

9 **MS. DUNCAN-BECERRIL:** So next year -- so if we just
10 sort of, like, play this out a little bit.

11 Next year they will have two years of scoring, and if they
12 do not improve, if they continue to struggle, they would be
13 caught up in the scoring for comprehensive review. It's just
14 last year their data was inside of their authorizer's data, and
15 to break that out is very complicated. And so we treated them
16 as this is the first year we're measuring them as a charter
17 school by themselves.

18 **THE COURT:** But if you're measuring them -- if so
19 much of the analysis for whether a district goes into
20 comprehensive review is based on a comparison between how they
21 did this year and how they did last year, and if you don't have
22 the ability to run that comparison for these broken-off charter
23 schools, then how did they get -- how did they end up with
24 scores of less than 62 percent?

25 **MS. DUNCAN-BECERRIL:** So there is 28 elements within

1 the comprehensive scoring methodology that we use. Not every
2 single one of them uses the previous score from the previous
3 year.

4 And on top of that, there are -- they did have a
5 dashboard. So they had those three dashboard elements. So
6 they likely were -- they based -- their scoring was based on
7 very few elements.

8 **THE COURT:** Okay. And then -- so then -- I know this
9 came up last time, but in light of the fact that they had
10 scores that were below 62 percent, what was the reason for not
11 putting them into comprehensive review?

12 **MS. DUNCAN-BECERRIL:** Because they were first year
13 charter schools. Because they were -- it was the first year we
14 have ever monitored them as -- as their own entity. We have
15 never ever monitored them as their own entity. We've only ever
16 monitored them as part of their school -- their authorizing
17 school district.

18 **THE COURT:** So the score that was -- the score of
19 below 62 percent that was attached to that charter school
20 doesn't -- essentially doesn't mean anything, it sounds like
21 what you're saying.

22 **MS. DUNCAN-BECERRIL:** Currently yes. Or it's based
23 on very few elements. So obviously those districts are in PIR.
24 And if they continue to have poor performance, they would be in
25 CR next year.

1 This happens, like, if you open -- if you open a charter
2 school today, then you wouldn't have data in the previous year.

3 **THE COURT:** Right.

4 **MS. DUNCAN-BECERRIL:** So you would -- we wouldn't be
5 able to measure you this year. It's the same --

6 **THE COURT:** I get all -- I get all that. The part
7 that threw me off is I guess I would have expected all of those
8 schools to have, instead of to have -- expect -- instead of
9 them having a percentage score based on the comprehensive
10 review criteria, I would have expected there to be a "not
11 applicable" in that box.

12 **MS. DUNCAN-BECERRIL:** So for the majority of the
13 elements that they were chosen for, they have a "not
14 applicable" in those elements.

15 So of the 28 elements that are used, for the majority of
16 them they have a score of "not applicable." And then when, in
17 the CR data analysis we provided that to the Monitor as well,
18 there is a flag that says "Selected for CR: Yes, no." And
19 that is -- so we get the scores and then we look at the
20 charter -- we look at all the districts and we determine what
21 the cutoff is going to be and then also are there first year
22 charters. And that's what flags that "Selected for CR: Yes,
23 no."

24 **THE COURT:** Okay. Which -- and the -- and what
25 that -- what that essentially means -- correct me if I'm wrong,

1 but I think what that essentially means is that for those
2 schools, for those charter schools, whatever percentage they
3 were assigned, 62 percent, 50 percent, 20 percent, it's a
4 meaningless number because the -- the true analysis for the --
5 the true analysis for eligibility for comprehensive review
6 isn't actually being conducted.

7 **MS. DUNCAN-BECERRIL:** Not yet. That is correct.

8 And so it should also be clear when we start with the data
9 analysis, we don't start at the district level. We start by
10 aggregating at the student level.

11 So we don't necessarily know, you know, this
12 Student 52471689 goes to this school and we do it that way.
13 That all comes afterwards. We sort of pull all the district
14 data together, then we run the analysis, and then we identify
15 the factors that may exclude a district or a charter school
16 from CR monitoring.

17 **THE COURT:** Okay. Do you have any other questions
18 about that?

19 **MR. MLAWER:** Well, the 215 districts that did not get
20 a score in CDE's methodology, what kind of districts are those?

21 **MS. DUNCAN-BECERRIL:** The majority of them are going
22 to be charter schools that did not meet the minimum in size
23 criteria for the calculation.

24 **THE COURT:** And the minimum end size criteria for the
25 calculation, was it the same across criteria?

1 **MS. DUNCAN-BECERRIL:** No. For assessments and
2 suspension, it is 30; and for most of the other elements, it's
3 20. We filed on the docket, and I can find it, the minimum end
4 size criteria for all the elements that were used.

5 **THE COURT:** Okay. But it was -- you said for
6 suspension and a couple others it was --

7 **MS. DUNCAN-BECERRIL:** And assessment, it is 30.

8 **THE COURT:** It is 30. And for most of the others,
9 you said it was 20?

10 **MS. DUNCAN-BECERRIL:** 20, yeah.

11 **THE COURT:** Okay.

12 **MR. MLAWER:** Now, is that cumulative enrollment? Or
13 end of year?

14 **MS. DUNCAN-BECERRIL:** Well, it depends on the
15 indicator. So the indicator uses different types of
16 enrollment.

17 For example, for the -- for assessment we use concurrent
18 enrollment, which means they had to have been enrolled between,
19 I believe it was December 1st and the start of the testing
20 period in order to be included. And then -- the suspension
21 uses cumulative enrollment. And then for least restrictive
22 environment, we use census enrollment. Because you have to
23 ensure that the students that you have in the numerator are
24 also students that you would have in the denominator.

25 **THE COURT:** So the -- the -- was it 215 districts,

1 did you say? So those, those are going to be charter schools
2 and potentially also just really small school districts.

3 **MS. DUNCAN-BECERRIL:** Yes. And I hope that we will
4 be able to talk about that later. I have a whole thing.

5 **THE COURT:** Okay. Go ahead.

6 **MR. MLAWER:** Okay. So we applied several different
7 methodologies to these districts.

8 The first concerned four selection indicators, and we
9 tried to focus both on the four indicator methodology and the
10 seven indicator methodology on those indicators that are
11 arguably more important than issues like timeliness, for
12 example.

13 So here on the table on my Page 3, you will see how this
14 worked out for -- including all districts, including those with
15 small end sizes.

16 So this methodology, if applied to the same data, would
17 not select any of the districts that CDE selected and the --
18 the vast majority of the districts that would be selected were
19 those that either scored 70 and above -- 70 percent and above
20 in CDE's methodology or had no score in CDE's methodology.

21 When we took the small ends out, and this is the top table
22 on the next page, the results are fairly similar, although this
23 method --

24 **THE COURT:** Could I just ask a clarification question
25 about that?

1 **MR. MLAWER:** Yes.

2 **THE COURT:** You say, "When we took the small ends
3 out." Your definition of taking -- your version of taking the
4 small ends out is different from their version of taking the
5 small ends out.

6 **MR. MLAWER:** That sounds right. Yes.

7 **THE COURT:** You took out districts with fewer than
8 ten test takers.

9 **MR. MLAWER:** Ten test takers on the ELA.

10 **THE COURT:** Okay.

11 **MR. MLAWER:** So here we picked up eight of the
12 districts that were selected by CDE. Seven that were below
13 62 and not selected. But the majority of these districts fell
14 elsewhere, 70 plus or no score would -- would be a majority of
15 the 101 districts that would be selected by this methodology.

16 We then moved to seven selection indicators by adding in
17 three additional least restrictive environment indicators, two
18 school age and one preschool.

19 The table below that on my Page 4 shows how that would
20 work out, which again did not pick up any of the districts
21 picked up by -- selected by CDE and the majority of the
22 districts picked up here again, the overwhelming majority were
23 either 70 plus or had no score.

24 Then again, taking out those with fewer than ten test
25 takers, here we picked up four of CDE's districts, but again

1 the majority were elsewhere, 70 plus and no score.

2 And then finally we developed a methodology that would use
3 all of the indicators that were in CDE's formula as we
4 understood it but did not count any improvement or regression
5 from the prior year. So same indicators and a more static way
6 of looking at it.

7 Here we came closer to the districts that were selected by
8 CDE, picking up 21 of the districts that CDE selected.

9 But the majority of districts, the 100 districts that
10 would be selected by this methodology, were not selected by
11 CDE.

12 We then again took out those with fewer than ten test
13 takers and here came a little bit closer to CDE. Picked up
14 23 of its districts, but the majority of the 92 districts that
15 would be selected with this methodology were not selected by
16 CDE.

17 So our conclusion here is basically what I just said. And
18 considered in this -- in this -- these approaches, there are
19 significant number of districts that appear to perform worse
20 than those that were selected by CDE.

21 And that conclusion comes from first using formulas that
22 did two things: Focused on the indicators that are arguably
23 most important and not include improvement or regression at
24 all.

25 The second focused on the same indicators and did not

1 include improvement or regression.

2 **THE COURT:** So on that -- I have a number of
3 questions. On -- so looking at the table at the bottom of your
4 Page 5.

5 CDE selected 34 total districts for comprehensive
6 monitoring, and you've got 100 districts in your low score
7 group, so that's a little bit apples and oranges; right?

8 And I guess my question -- I guess I would say this is a
9 question I have for this chart and for all of the charts, is --
10 it seems to me what happened -- what CDE did is they -- they
11 identified a universe of districts that were going to be
12 selected for -- that were going to be considered for
13 comprehensive monitoring. And that universe did not include --
14 if I'm understanding all of this correctly, that universe did
15 not include the second group on your charts, the below
16 62 percent not selected for CR because those were all the
17 charter schools; right?

18 And the universe also did not include -- I'm less sure
19 about this, so I'm looking for confirmation. The universe also
20 did not include districts that fell below a certain end size.
21 And the end size was -- was it one end size for purposes of
22 establishing the universe of districts that could be assessed
23 for possible comprehensive review?

24 **MS. DUNCAN-BECERRIL:** No.

25 **THE COURT:** It's the combination of all those end

1 sizes within your --

2 **MS. DUNCAN-BECERRIL:** That is correct.

3 **THE COURT:** Okay.

4 **MS. DUNCAN-BECERRIL:** Again, because if you do a
5 numerator and denominator, you want to ensure that when you're
6 looking at the student -- so each individual indicator will
7 have a minimum end size because you want to ensure that the
8 numerator and the denominator are -- encapsulate the same
9 students.

10 **THE COURT:** And so I -- I guess what I would -- I
11 mean, I think this analysis is helpful and it raises some --
12 you know, potentially raises some further red flags. But I
13 would like -- the chart that I would like to see is a chart
14 identifying the same universe of districts that CDE considered
15 for -- as candidates for comprehensive review, comprehensive
16 monitoring; right? So I think that -- what that would mean is
17 you would get rid that second group below 62 percent not
18 selected for CR.

19 We already know that it's -- you know it's a problem that
20 those -- those districts, those schools are outside the
21 universe. We already know that; right?

22 And so the next question is, you know, what about CDE's
23 methodology for selecting the districts for comprehensive
24 monitoring that are within the universe of candidates for
25 comprehensive monitoring?

1 And the universe that they -- and it's also a problem, by
2 the way, that I think that districts that didn't meet the end
3 size, right, not the charter schools but other districts that
4 didn't meet the end size are automatically not candidates for
5 comprehensive monitoring. That's another problem. I think we
6 already know that that's a problem. I think that they agree
7 that that's a problem; right?

8 So -- so it seems to me that to get a better assessment of
9 CDE's methodology for selecting schools for -- districts for
10 comprehensive monitoring, we should conduct an analysis using
11 your preferred criteria on -- and perform that analysis on the
12 same universe of districts that CDE was considering and then
13 say, okay, what's the comparison there?

14 Of the 34, you know, districts that CDE selected from that
15 universe, how many from that same universe would your
16 methodology have captured? And how many -- you know, and which
17 other districts from that universe would your methodology have
18 captured?

19 And it seems to me that that's not in here. I don't know
20 if it's from a lack of data or, you know, more data needs to be
21 turned over or what. But I -- I think that's the analysis that
22 needs to be conducted if we want to get a better sense of
23 whether CDE's current methodology for flagging districts for
24 comprehensive monitoring is arbitrary or something close to
25 arbitrary.

1 **MR. MLAWER:** So we would want to remove the
2 categories -- remove the 69 districts that were below 62 and
3 not selected and also remove the no score districts?

4 **THE COURT:** I guess so. The no score districts are
5 the ones that are either charter schools or school districts
6 that are very small.

7 **MS. DUNCAN-BECERRIL:** Your Honor, if I may, I think
8 there is also concerns about end size, too, that we should
9 consider in the Monitor's analysis. Because the worse
10 performing districts in the Monitor's analysis are very, very
11 small and were selected on very few items.

12 **THE COURT:** That's why I want to do an apples and
13 oranges -- put the same --

14 **MS. DUNCAN-BECERRIL:** I have a chart if you would
15 like to see the comparison.

16 **THE COURT:** Sure. But what I want -- what I want to
17 know is whether that comparison can be done.

18 So, you know, apples to apples in terms of -- do you have
19 the data now to do an apples to apples comparison in terms of
20 end size and in terms of eliminating these charter schools.

21 **MS. WAGNER:** If I may speak?

22 **THE COURT:** Of course.

23 **MS. WAGNER:** So in order to eliminate -- so we know
24 those 69 were eliminated because they were first year charters.

25 None of the other groups, the other almost 2,000 districts

1 is --

2 (Court reporter clarification.)

3 **MS. WAGNER:** So I would need to know for every
4 district in the dataset I was given which were first year
5 charters so I could just eliminate them entirely.

6 **THE COURT:** Well, it seems --

7 **MS. WAGNER:** Because in the other score groups that
8 we have, I'm assuming there would be first year charters in
9 those as well, that they are not just the 69.

10 **MS. DUNCAN-BECERRIL:** We definitely have the
11 information. I have to see -- I thought it was part of the
12 information that was requested.

13 **MS. WAGNER:** And maybe I missed that column. But in
14 looking at the data, we can figure out which were first year
15 charters because as we said earlier, they had scores on -- on
16 the dashboards.

17 **MS. DUNCAN-BECERRIL:** We definitely have that data.
18 I can look back through it. I don't have the exact dataset.
19 I'm trying to pull it up.

20 **THE COURT:** But basically what -- what we would need
21 to take out is all the first year charters and all of the
22 districts, whether charters or school districts, that are below
23 the end size that the -- that the CDE used in eliminating
24 districts that were potential candidates for comprehensive
25 monitoring.

1 **MS. DUNCAN-BECERRIL:** And that is in that data that
2 was provided to the Monitor. Those districts are identified as
3 "NA," not applicable.

4 **MR. MLAWER:** In which column?

5 **MS. DUNCAN-BECERRIL:** Any of the "Target Met"
6 columns.

7 There is also -- yeah, any of the NA columns would be
8 there. So anytime a district has in the targets where it says
9 "Target Met" or "Not Met," anytime there is an "NA," that would
10 identify them as being too small.

11 **MS. WAGNER:** Yes, and so we took that into account
12 for our met indicator analysis.

13 **THE COURT:** So what's the answer in terms of whether
14 we have the data now to run the kind of analysis that I would
15 like to see run? Do we have that?

16 **MS. WAGNER:** I -- I believe I still need a field
17 indicating first year charters.

18 **MS. DUNCAN-BECERRIL:** We can give you that today.

19 **MS. WAGNER:** Or I need to know which field you sent
20 me that would indicate that.

21 **MS. DUNCAN-BECERRIL:** We can give that to you. We
22 can provide that today. I could find it on the break.

23 **THE COURT:** Okay.

24 Mark, did you have -- I have been interrupting you a lot.
25 Did you have anything else that you wanted to say about this

1 piece of it?

2 **MR. MLAWER:** No, Your Honor.

3 **THE COURT:** Let me -- okay. So you have a response,
4 and part of your response is in this chart.

5 I have a couple questions for you, but why don't you go
6 ahead and tell us. Tell us what you want to tell us about this
7 chart.

8 **MS. DUNCAN-BECERRIL:** Certainly.

9 So when we looked at the worst performing districts in
10 both of the seven method greater than -- or equal -- or greater
11 than 10 and the 22 method employed by the Monitor on greater or
12 equal than 10, we found -- when we compare the three worst
13 performing districts, we see something I find to be striking
14 because I think the end size is limited to 10.

15 And it is that our worst performing districts are Antioch,
16 Stockton, and Oakland with scores, I believe, in the 50's. And
17 they have students with disabilities, populations 2300, 3500,
18 5100. Whereas, the three worst performing districts in the
19 seven methodology have 12, 9, and 17 students and in -- the
20 22 factors has 34, 15, and 13.

21 In all but --

22 **THE COURT:** Could I ask just one quick clarification
23 question about that?

24 **MS. DUNCAN-BECERRIL:** Absolutely.

25 **THE COURT:** For Shenandoah Valley, I thought that the

1 idea -- I thought that Mark was using the number 10 so that if
2 10 or more disabled students took the performance exam; is that
3 what it was?

4 **MR. MLAWER:** We did it both ways.

5 **MS. DUNCAN-BECERRIL:** So that's the census date. So
6 when you look at the ELA test takers, that's why using a single
7 bar to select districts is kind of inappropriate. So on
8 December 1st, they had nine students enrolled. Their
9 cumulative enrollment throughout the year for that district --
10 give me one moment.

11 (Brief pause.)

12 **MS. DUNCAN-BECERRIL:** So for Shenandoah Valley, their
13 cumulative enrollment was 10.

14 **THE COURT:** Okay.

15 **MS. DUNCAN-BECERRIL:** So they had a student that
16 wasn't either in -- in the school on December 1 or had left.

17 **THE COURT:** Okay.

18 **MS. DUNCAN-BECERRIL:** So sort of when we do the
19 comparison when I look at the students who were proficient in
20 ELA and math, only two districts on the Monitor's selection
21 criteria who are considered the worst are selected -- have a
22 lower proficiency rate than Oakland, Stockton, and Antioch.
23 And that's because they had zero students proficient.

24 **THE COURT:** What about the four factors? Did you run
25 it for the four factors?

1 **MS. DUNCAN-BECERRIL:** So the four factors -- yes, I
2 have that data.

3 **THE COURT:** What does that look like?

4 **MS. DUNCAN-BECERRIL:** So again using the four
5 factors, the three districts, Edward B. Cole, Shenandoah
6 Valley, and PACE Academic -- Academy charter are the three
7 lowest performing districts.

8 **THE COURT:** So the same for the seven factors?

9 **MS. DUNCAN-BECERRIL:** Yes. In part because I think
10 the three additional factors were not applicable to -- to
11 the -- to those three charters because they didn't have scores
12 in the previous -- they -- they didn't have scores. They were
13 too small.

14 **THE COURT:** Okay. Well, I think this probably
15 highlights why -- I mean, again, we have the separate problem
16 about not, you know, considering smaller districts for
17 comprehensive review, and you said you wanted -- there is
18 something you wanted to say about that, and that's fine. But I
19 think we already kind of established last time that that's a
20 separate problem.

21 But I think that the -- you know, we do need an apples to
22 apples comparison. The universes need to be apples to apples
23 when we conduct the analysis for it to be helpful. And so I
24 think we need to conduct that analysis.

25 Let me ask, though.

1 **MS. DUNCAN-BECERRIL:** So, Your Honor, if it would be
2 helpful, our staff recreated the analysis done by the Monitor,
3 and I have staff currently now at my office awaiting any kind
4 of analysis that they want -- that you would like to be done.
5 They could be doing that analysis now if you prefer and we
6 could file it relatively soon.

7 **THE COURT:** Yeah, but I would, also like you to
8 provide the data to Susie so that Susie can run it herself. So
9 both of those things are fine.

10 But let me ask you: The factors that Mark selected, the
11 four factors, the seven factors, do you agree that from a
12 standpoint of being concerned about whether a district is
13 providing an appropriate education to disabled kids that those
14 are probably the best four or seven factors to zero in on?

15 **MS. DUNCAN-BECERRIL:** Those -- yes. Those are
16 arguably the most important factors in terms of, you know,
17 gauging FAPE, or Free Appropriate Public Education.

18 You know, when we select districts for comprehensive
19 review, we look at a variety of elements, not simply one
20 element. That is gauged in another monitoring activity, but --
21 because we look at districts who are most egregious in both
22 performance and compliance.

23 However, one of the things I had been thinking about
24 reviewing the data that we have and the concerns that have been
25 brought up here is one better method to doing this analysis, if

1 the Court feels like these are really important elements, and
2 we agreed, is to weight those elements. So still use the --
3 all 28 elements, but weight the assessment factors, the
4 suspension factors, and the -- the least restrictive
5 environment factors heavier. So that districts who are doing
6 very poorly there would be selected -- would be more likely to
7 be selected.

8 Another thought that I have had -- obviously I have been
9 spending an awful lot of nights reading these documents -- is,
10 you know, we really believe in improvement. And if -- if a
11 district is getting worse, that's the district we really want
12 to focus our resources on and not districts that are getting
13 better.

14 But one thing we could do that would, I think, help this
15 discussion that we have had move along is to instead of using
16 the targets, because I think there is some discussion about
17 what the targets are and how ambitious there are and that they
18 are going to change soon, is to look at sort of a quartile
19 scoring. Right? So we look at the lowest -- we look -- very
20 similar to the Monitor's approach, where he looked at the
21 most -- the poorest performing districts in those elements.

22 **THE COURT:** Not just whether you met the target, but
23 how badly you missed it.

24 **MS. DUNCAN-BECERRIL:** Yes. And whether or not you're
25 improving. So we could weight those elements. We could look

1 at their scores. I think we could do that for comprehensive
2 review selection.

3 I think there still is value in looking at the targets
4 because we have to publish them. For Performance Indicator
5 Review for districts who are not meeting those targets, we will
6 re-bench the targets. We have talked about this before, but I
7 think that there is still value in that for Performance
8 Indicator Review.

9 But if we're talking about the most egregious districts in
10 the State, there is value to looking at maybe a quartile
11 approach and looking at improvement and weighting those
12 variables to ensure that we are identifying the most serious at
13 need districts.

14 **THE COURT:** In terms of the targets, can you remind
15 me -- I know you told me this last time, but can you remind me
16 when the targets are going to be revisited? Was it this fall?

17 **MS. DUNCAN-BECERRIL:** Yes.

18 **THE COURT:** Okay.

19 **MS. DUNCAN-BECERRIL:** This fall we are going to start
20 to convene a stakeholder group to set the targets.

21 **THE COURT:** And when will you expect new targets to
22 be set?

23 **MS. DUNCAN-BECERRIL:** We will need to have them set
24 probably by the spring so that we can submit them to the
25 U.S. Department of Education so they can be used starting 2021

1 through 2026.

2 **MR. MLAWER:** That's the February 1st submission -- is
3 it February 1st of the APR?

4 **MS. DUNCAN-BECERRIL:** Yeah, for February 1st, 2020.

5 **THE COURT:** When you say you have to submit them to
6 the Department of Education, U.S. Department of Education, they
7 have to sign off on the targets?

8 **MS. DUNCAN-BECERRIL:** Yeah. So they don't -- they
9 don't give us a stamp of approval. They just say, you're
10 within compliance or they don't say anything.

11 **THE COURT:** They don't object.

12 **MS. DUNCAN-BECERRIL:** Only if they object if -- when
13 we make the changes, yes.

14 **MR. MLAWER:** Did I also understand correctly from the
15 first two days of hearing that you -- hearings that you're
16 having another activity this summer concerning the small
17 districts? Did I understand that right?

18 **MS. DUNCAN-BECERRIL:** Yes. Do we have time now to
19 talk about that?

20 **THE COURT:** Yes.

21 **MS. DUNCAN-BECERRIL:** I do have a handout. And this
22 handout, I think, talks -- goes into some of the issues around
23 Inquiry 2 as well, because the majority of districts in
24 Inquiry 2 are very small.

25 So the National Center on Education Statistics recently

1 published a guidance document in 2017 that -- to help states --
2 to guide states on developing minimum end size criteria. And
3 in ESSA, there is a requirement that states come together and
4 determine what a -- a minimum end size criteria is, submit it
5 to the U.S. Department of Education.

6 The Office of Special Education Programs has recognized
7 this as a concern, especially around disproportionality and has
8 actually set minimum end size criteria for states to be at and
9 has required an approval if they want to be -- have a lower
10 minimum end size or a greater minimum end size. There are lots
11 of reasons why end size is an issue; right? You get lots of
12 variability.

13 So this is a document we are preparing to work with
14 stakeholders on, but I added some information in here for this
15 case so you could see.

16 Remember, when you have an LEA with a thousand students
17 with disability, each student is .1 percent of the outcome.
18 So 40 students with disability with an academic performance of
19 one, that's the lowest academic performance, would be
20 400 students. Whereas, if they have 10 students, then
21 40 students would be -- 40 percent would be four students,
22 right? So do we select districts based on the outcomes of four
23 students or 400? And that is kind of the concern.

24 And we can see this within the Monitor's selection
25 methodology. When you -- even when you begin to apply -- when

1 you're not applying a minimum end size criteria, the number of
2 students served by those LEAs that were selected, the
3 101 selected is very small. Even using the seven and four,
4 it's smaller. But once you start adding 22 elements or adding
5 the minimum end size criteria that we applied for our current
6 method, the LEAs we selected covered 180,000 students.

7 So in effect, we could be working with districts to
8 improve the outcomes for 180,000 students versus 867.

9 One of the things that we were thinking about -- and this
10 is on the next page. And I will file on the docket that
11 National Center on Education Statistics report so that you can
12 review it if you would like.

13 **THE COURT:** Great.

14 **MS. DUNCAN-BECERRIL:** But, you know, they say that --
15 you know, they talk about something called "meaningful
16 difference," which in statistics is when you're looking at a
17 difference between one district and another. Is the difference
18 real or is it based on some sort of statistical anomaly? Like
19 the student came to school that day and started the test and
20 then got sick and left or didn't want to take the test. Does
21 that score weight more than -- is it equivalent to three or 400
22 students not doing well in LEA?

23 So we have been sort of playing around with this idea of
24 what it would look like in the beginning to do some models
25 about what it might look like.

1 So one option I had briefly discussed the last time we
2 were here was around grouping districts that are small together
3 by county and then running all the analytics by that county and
4 determining is the county, all the small districts in that
5 county doing poorly and then identifying whether it's a
6 school-based issue. So are there a lots of students at one
7 school doing poorly, or is it a county-wide issue? And then
8 selecting either counties or districts based on those elements.

9 I honestly believe in my professional opinion that even a
10 minimum end size in terms of doing all the calculations,
11 grouping districts together who have a student with disability
12 population of 100 or less is a good practice. Because, really,
13 that -- at that point then each student counts for 1 percent of
14 the outcomes. And it's not sort of a weighted percentage for
15 each student.

16 So we did model this for a couple of indicators by
17 county --

18 **THE COURT:** So just to make sure I understand that,
19 that last point. You're saying that any -- you want -- when
20 you're analyzing a group of students, you want it to be a group
21 of students that is at least 100.

22 **MS. DUNCAN-BECERRIL:** Yes.

23 **THE COURT:** So if there is a district that has fewer
24 than 100 disabled students, you're going to want to combine
25 that with somebody -- your view is that that should be combined

1 with some other district or something --

2 **MS. DUNCAN-BECERRIL:** Yes.

3 **THE COURT:** Okay.

4 **MS. DUNCAN-BECERRIL:** Because then they are not
5 overly weighting the percentage -- the totality of the
6 percentage. You get less variability.

7 And we modeled this for a couple of counties, Humboldt
8 County and Tulare County. Each of them have 17 LEAs, fewer
9 than 100 -- Humboldt has 17, and Tulare has 22. Their
10 proficiency rate is 34 versus 5.78 for ELA. 20 percent versus
11 5.2 for math. A suspension rate of 2.89 or 4.95, so it's
12 greater than the State target. Still, students with
13 disabilities combined, greater than 100. And a total
14 enrollment, typically greater than a thousand.

15 So as you can see here, this shows -- like, Humboldt,
16 there seems to be some good progress here. Whereas, Tulare
17 should be looked at more closely.

18 **THE COURT:** And this is -- the proficiency rates are
19 proficiency rates among disabled students?

20 **MS. DUNCAN-BECERRIL:** Yes. And students who had
21 concurrent enrollment.

22 **MR. MLAWER:** The students with disabilities column
23 for Humboldt, that is across the 17 constituent district.

24 **MS. DUNCAN-BECERRIL:** Yes. Uh-huh. And that's a --
25 that's a census count.

1 Another option would be to look at this same kind of data
2 by SELPA, which is Special Education Local Plan Area. I will
3 tell you that one concern I have is we have charter local plan
4 areas, and we have one charter SELPA that has 500 charters.

5 So it kind of grouped them all together. I don't know if
6 that would be -- and they are all over the State. So I don't
7 know if you would take into account regional differences and
8 things like that.

9 **MR. MLAWER:** Is it your expectation, then, that the
10 department will have an approach designed by the end of the
11 summer? Is that correct?

12 **MS. DUNCAN-BECERRIL:** Absolutely. I believe we have
13 to have something by the end of the summer so that we can apply
14 it for the 2019, '20 monitoring year.

15 **MR. MLAWER:** Okay.

16 **THE COURT:** So you'll have an approach -- this sort
17 of gets into a question that I wanted to ask you all.

18 So you'll have an approach on end size by the end of the
19 summer.

20 **MS. DUNCAN-BECERRIL:** Uh-huh. Yes, sir.

21 **THE COURT:** And you'll have new targets by next
22 spring.

23 **MS. DUNCAN-BECERRIL:** Yes, sir.

24 **THE COURT:** Is that right?

25 **MS. DUNCAN-BECERRIL:** Target setting tends to take a

1 little bit longer because each indicator will have its own
2 target. And so what typically happens is we bring some models
3 to stakeholders and then they say, "Well, we would like to see
4 this" or "We would like to know this" or "What about this kind
5 of thing?" We do it again. And we sort of whittle it down.

6 So it's over several meetings. And I think we have agreed
7 that we want the stakeholder group to be broad, to include
8 parents, school administrators, teachers, advocates, to be part
9 of that process. And so that takes time to schedule the
10 meetings.

11 **THE COURT:** I gather if the plaintiffs want to be
12 folded into that process, they can be?

13 **MS. DUNCAN-BECERRIL:** Absolutely. Absolutely. We
14 would welcome that.

15 **THE COURT:** And so the -- the question I have, and
16 you may want to give this a little bit of thought over the
17 break. You know, for Phase 1, what I essentially concluded was
18 that the State passes, quote/unquote; right? There are some
19 problems that need to be cleaned up, but we can move on to
20 Phase 2. The State passes. And with respect to the problems
21 that were identified, we can kind of circle back at the --
22 towards the tail end to -- for the State to establish how it's
23 cleaned up those problems.

24 It seems to me that for Phase 2, the State is going to
25 fail, and the problems with respect to data analysis are much

1 more fundamental and kind of widespread than at Phase 1.

2 And so it seems to me that we probably are not in a
3 position to say, okay, here are some aspects of it that are
4 okay. Here are some aspects of it that are problematic. We'll
5 move on to Phase 3 now, and you'll circle back to us to tell us
6 how you dealt with the problems on Phase 2.

7 I don't think that -- I don't think that's going to work;
8 right? I think -- we're going to need to figure out a time for
9 you all to come back to us and explain how all of these
10 problems have been fixed.

11 And so, you know, one question is: What is the ideal time
12 to do that? And the next question -- and maybe you need to see
13 my ruling before you can answer that question, but the -- you
14 know, the other question is: Should I be doing anything with
15 respect to Phase 3 before we have sort of -- before the State
16 has taken another shot at establishing compliance or before the
17 State has taken another shot at passing Phase 2.

18 And I guess I have -- my tentative inclination would be
19 that even though I'm very sensitive to how long this Consent
20 Decree has been in place and how long this Court monitoring
21 process has been in place, the -- it may not make sense for us
22 as part of this case to move on to Phase 3 until we've gone
23 back to the drawing board on Phase 2 and sort of tried again.

24 So that is my -- you don't have to say anything about that
25 now. You can chat about that in -- you know, in the break or,

1 you know, you can even tell me that you don't want to sort of
2 offer a view on that today.

3 But, you know, the question that we're all going to have
4 to think about is, you know, if I issue a ruling which says no,
5 we can't -- no, you need to come back and show me how -- you
6 know, there needs -- to establish compliance with federal law,
7 there need to be dramatic changes with respect to data analysis
8 and you have to come back and establish that you've made those
9 changes or that you're well down the road of making those
10 changes before you can pass Phase 2, you know, how does that
11 implicate the timing of all of this? That's the reason for the
12 question.

13 So that -- anything else that -- is there anything else
14 that anybody wants to discuss on the first point of Mark's
15 report before we go to the second point?

16 (No response.)

17 **THE COURT:** Go ahead.

18 **MR. MLAWER:** Okay. Turning to the meets requirements
19 districts.

20 We started with 499 districts that met requirements,
21 preliminarily were labeled meets requirements by CDE. We took
22 three of those districts out because they appeared to have
23 dashboard results that were red or orange, which doesn't make
24 sense. We think, as I indicated in a footnote, that that's
25 probably a coding area, so we simply removed them from the

1 analysis so we can move on.

2 The first thing we noticed about these districts is that
3 they are very small. Only seven of these districts had more
4 than 100 students with disabilities based on the end of year
5 information. And 113 had between one and ten. So the first
6 table that you see on my Page 7 shows the distribution, the
7 size distribution of these districts.

8 Now, the data that we had showed some concerns in many of
9 these districts. So we started with districts that had a
10 zero percent proficiency rate in English language arts, math
11 and in both assessments.

12 So the first table does not exclude any districts. So
13 you'll see that 61 of the districts had no proficiency rates at
14 all. About half of the districts did not have zero percent in
15 either ELA or math. But about 3-and-a-half percent had zero
16 percent proficient in ELA, almost 14 percent in math --

17 **THE COURT:** I want to make sure you stated that
18 correctly. So more than 50 percent of the districts had zero
19 percent proficiency in both --

20 **MR. MLAWER:** No.

21 **THE COURT:** -- English and math?

22 **MR. MLAWER:** Had in neither English or math. They
23 were above zero percent proficient in both.

24 **THE COURT:** All right.

25 **MR. MLAWER:** And about 18-and-a-half percent of the

1 districts had zero percent proficiency in both English language
2 arts and math.

3 We then excluded those districts where the proficiency
4 rates were based on fewer than ten test takers. And that table
5 at the bottom of my Page 7 shows how those distributed.

6 So here about three-quarters of these districts did not
7 have a zero proficiency rate in either one of them, in either
8 English language arts or math.

9 About 7.3 percent of these districts had zero percent
10 proficiency in both ELA and math. Almost 13 percent in math
11 only. And almost 3 percent in English language arts only.

12 We next noticed that many of these districts were rated on
13 very few indicators for comprehensive review selection
14 purposes. So you can see the distribution there on the chart,
15 the table on the top of Page 8. So 143 of these districts were
16 rated on no indicators for -- for this particular purpose, for
17 CR selection purposes. And you can see how it distributes
18 through the various options there. But about 68 percent of
19 these districts were rated on five or fewer indicators for
20 purposes of comprehensive review selection.

21 Then we turn to suspension rates. And a little bit under
22 30 percent of these districts had no suspension rate listed,
23 which puzzled us. So I wanted to see if I could just interrupt
24 myself briefly and ask the policymakers why that would be the
25 case; that a district had a zero percent suspension rate. We

1 can come back to this.

2 **MS. DUNCAN-BECERRIL:** I'd have to look at the data.
3 I'm not sure. I'd have to look at it. I'm sorry.

4 **MR. MLAWER:** Okay. So the first set of results are
5 positive, that 221 of these districts had a zero percent
6 suspension rate --

7 **THE COURT:** Are you asking why there would be no
8 suspension rate or why there would be a zero?

9 **MR. MLAWER:** It was missing. We just didn't have a
10 rate.

11 **THE COURT:** You're asking why would there be
12 districts where it was missing.

13 **MR. MLAWER:** Right. If the district had students and
14 none were suspended, you would expect the rate to be zero
15 percent. So just puzzled by that.

16 And about 55 percent of these districts had suspension
17 rates of less than 4-and-a-half percent. So that is all quite
18 positive.

19 On the other hand, a little over 15 percent of these
20 districts that were labeled meets requirements had suspension
21 rates above 4-and-a-half percent, and about 7 percent had
22 suspension rates 10 percent or higher.

23 So the first table shows that, and the second table on
24 Page 8 redoes it based -- removing those districts that had
25 fewer than ten students in the census count.

1 One of these districts had a suspension rate of over
2 58 percent, and five districts had suspension rates between
3 20 percent and 36-and-a-half percent roughly.

4 Now, in the CDE's comprehensive review selection process,
5 each of these districts scored at least 75 percent of the
6 available points, the points available to that district.

7 So we then on the next page, on Page 9, we applied the
8 formulas, the -- what we call the top four, the top seven, and
9 the 22 indicator formulas to these districts, and here these
10 first two tables we show you the distribution of the
11 percentages.

12 Then starting at the bottom of Page 9, we show you the
13 numbers of districts that would have been selected using each
14 of those methodologies.

15 So the four method -- this is including all these
16 districts, including the small ends, would have selected 78 of
17 these meets requirements districts. The top seven methodology
18 would have also selected 78. The 22 indicator methodology
19 would not have selected any.

20 Turning to Page 10, we then remove the small ends. And we
21 see the results, that 21 of the meets requirements districts
22 would be selected using the top four, 44 for the top seven, and
23 four using the 22 indicators.

24 So this, as I say in the paragraph that immediately
25 followed, was surprising to us. If, you know, using any

1 methodology that's defensible, you would not expect any
2 districts labeled meets requirements to be selected for an
3 intensive monitoring process.

4 And at the end we simply noted that 32 of these districts
5 were among the districts whose -- thinking about Child Find for
6 a second -- were between one-and-a-half and two standard
7 deviations below the mean.

8 So if CDE's standard for selection there had been one and
9 a half rather than two standard deviations, then those 32
10 districts could not have been named meets requirements because
11 they would have been selected for Performance Indicator Review
12 for Child Find.

13 **THE COURT:** A couple questions about this. I'm
14 looking back at the suspension rates. What was the -- what was
15 the target -- what was the cutoff that -- on suspension rates
16 that would put you into Performance Indicator Review?

17 **MR. MLAWER:** There is no target. There is a
18 dashboard target. So if you got red or orange on the dashboard
19 for suspension rate -- this is my understanding of CDE's
20 process -- you are selected for Performance Indicator Review
21 for suspension. But here we were working with one year of data
22 and not the dashboard data. So instead we just showed the
23 distribution of the -- the one year suspension rates across
24 these districts.

25 **THE COURT:** Okay. Now, on Performance Indicator

1 Review, do we have this same kind of universe problem that we
2 were talking about in the last section? In other words, are
3 you looking at a different universe of districts that were
4 subject to Performance Indicator Review?

5 **MR. MLAWER:** Well, we were not looking at it that
6 way. We were looking -- CDE sent us information showing the
7 districts that it preliminarily labeled meets requirements, and
8 that's all we were working from. So --

9 **THE COURT:** But by definition, that is -- that is all
10 districts that were not selected for performance indicator
11 review or Data Identified Noncompliance Review on any category.

12 **MR. MLAWER:** That's correct, in addition to
13 disproportionality review, comprehensive review, preschool
14 review, yes. The way to get meets -- meets requirements is to
15 not be -- in CDE's system is not to -- to be not selected for
16 any monitoring process.

17 **THE COURT:** So my question is: Were there -- and
18 this is probably just a product of my bad memory, but were
19 there -- of those 496 districts, did any of -- were any of
20 them -- did any of them not qualify for Performance Indicator
21 Review for some reason? Like because they were too small or
22 something like that? Like as was the case with the -- when we
23 were discussing comprehensive review monitoring?

24 **MR. MLAWER:** That is possible. I don't --

25 **MS. DUNCAN-BECERRIL:** That is correct, Your Honor.

1 **THE COURT:** Okay. So explain that to me.

2 **MS. DUNCAN-BECERRIL:** So 74 percent of those 499 -- I
3 have a chart. Sorry. I'm a picture person. Are -- have less
4 than 30 students in them.

5 **THE COURT:** Disabled students?

6 **MS. DUNCAN-BECERRIL:** Students with disabilities.

7 **THE COURT:** Okay.

8 **MS. DUNCAN-BECERRIL:** So the students with
9 disabilities, the majority of them are charters. Some of them
10 are very small schools or single school school districts.
11 There are a number of them as well.

12 And so they are -- for example, the Monitor states that
13 there are 57 LEAs who had a zero percent proficient. The
14 average number of students with disabilities in those LEAs is
15 16. Meaning a change in two students would put them above the
16 State-wide rate for proficiency. So --

17 **THE COURT:** What's the State-wide rate?

18 **MS. DUNCAN-BECERRIL:** I believe it's 15 percent.

19 **THE COURT:** Okay.

20 **MS. DUNCAN-BECERRIL:** So in terms of they would be at
21 the average, in the middle of all districts in the State for
22 two students. And so, again, this goes back to a lot of those
23 issues around small districts.

24 For example, when the Monitor states that they calculated
25 a number of districts who were selected, 78 LEAs who would be

1 selected for comprehensive review using his seven method, the
2 majority of those are based off of four elements. And not
3 taking into account the idea that there are very small --
4 16 students. So I'm not saying that there isn't work to be
5 done here. I'm saying the issue of smallest is a thing that
6 sort of permeates this as well. And so until we address that,
7 it's harder to look at the other.

8 **THE COURT:** So you said that 74 percent of the --
9 these 499 districts had fewer than 30 students with
10 disabilities in them.

11 **MS. DUNCAN-BECERRIL:** Yes.

12 **THE COURT:** And what I can't remember is does that
13 mean that they -- they were not going to be put into
14 Performance Indicator Review or Data Identified Noncompliance
15 Review regardless of what their numbers were?

16 **MS. DUNCAN-BECERRIL:** So they weren't put in this
17 year. This year was the year that we identified this as a
18 large problem because --

19 **THE COURT:** Sorry. They were or were not put --

20 **MS. DUNCAN-BECERRIL:** They were not --

21 **THE COURT:** -- in this here?

22 **MS. DUNCAN-BECERRIL:** They were not put into the
23 Performance Indicator Review. The reason for that is we always
24 had a minimum end size criteria. And the part of -- the big
25 part of that is because one or two students makes such a big

1 difference. And so that's why an end size of ten applied here,
2 it -- it doesn't capture that because when you're looking even
3 at 20 or 30 students, there is -- it makes a big difference.

4 **THE COURT:** So for the different performance
5 indicators, again there was a different end size?

6 **MS. DUNCAN-BECERRIL:** Yes.

7 **THE COURT:** All right.

8 **MS. DUNCAN-BECERRIL:** But we didn't -- this wasn't
9 a -- I think, a large problem until we added a thousand charter
10 schools into the mix. You know, and typically there is very
11 few small, small, small districts. But now there is a lot.
12 And so this is what is accounting for this. The majority of
13 these are charter schools. I want to say, like, 80 percent are
14 single charter schools that are now being put into our
15 criteria. And so --

16 **THE COURT:** So I guess the question is: How many of
17 these 499 -- it sounds like -- scratch that. Let me ask it a
18 different way.

19 It sounds like of these 499, a certain percentage of them,
20 perhaps a high percentage of them, were going to be labeled
21 meets requirements regardless of what their numbers were. Is
22 that --

23 **MS. DUNCAN-BECERRIL:** Yeah, that is correct. Unless
24 they had a complaint, you know, noncompliance associated with
25 complaints. If they had late IEPs, late triennials. Missed

1 60 new timelines.

2 **THE COURT:** So some of the data, what you refer to as
3 Data Identified Noncompliance?

4 **MS. DUNCAN-BECERRIL:** Yes.

5 **THE COURT:** Did I remember that right?

6 So --

7 **THE COURT:** So they may not have met the targets on
8 those things, and a lot of those targets were zero; right?

9 **MS. DUNCAN-BECERRIL:** They're zero.

10 **THE COURT:** And if they didn't meet targets on those
11 issues, they would not have been labeled "meets requirements"?

12 **MS. DUNCAN-BECERRIL:** That is correct.

13 **THE COURT:** But on Performance Indicator Review, no
14 matter what their -- no matter what the number was, they were
15 going to be labeled "meets requirements" --

16 **MS. DUNCAN-BECERRIL:** Yes.

17 **THE COURT:** -- on the theory that the -- whatever
18 number came out was not going to be worth anything because the
19 size was too small.

20 **MS. DUNCAN-BECERRIL:** Yeah. There is not a
21 meaningful difference. There is not -- you know, in terms of
22 statistically are we identifying a district because a student
23 got to the test that day and didn't feel good and went home, so
24 now the district should take more time and more energy from the
25 CDE as opposed to a district that has 400 students who are not

1 performing.

2 **THE COURT:** So all of that makes sense, and so it
3 seems like it's the same issue here in the second -- you know,
4 in the second section of Mark's supplemental report as with the
5 first section. That is, we need an apples to apples
6 comparison.

7 The fact that so many of these small districts were
8 labeled meets requirements when we didn't know if they met
9 requirements is already a problem and that's an obvious problem
10 and I don't think we need to conduct any further analysis to
11 know that's a problem, and I think nobody disagrees that that's
12 a problem; right?

13 **MS. DUNCAN-BECERRIL:** That is correct.

14 **THE COURT:** But so -- so the question is, you know,
15 for the -- for the -- I think the question is, to conduct a
16 further analysis, is for the districts that were identified as
17 meeting requirements that were not too small to have a
18 meaningful number, break those out; right?

19 So I'm making up the numbers, but there are 499 districts.
20 Let's say 100 of them were big enough to conduct a meaningful
21 analysis.

22 **MS. DUNCAN-BECERRIL:** 132.

23 **THE COURT:** 132. Okay. Let's look at those
24 132 districts and let's say, should -- you know, using CDE's
25 methodology, those were -- those were deemed to meet -- to meet

1 requirements. They were reported to the Department of
2 Education as meeting requirements. Should they have been
3 labeled as meeting requirements? What did things look like in
4 those 133 districts?

5 That would be the only way we could, I think, meaningfully
6 assess the CDE's current methodology for -- and CDE's current
7 methodology is if you meet all the targets, right, then you're
8 meets requirements. If you don't get put into Performance
9 Indicator Review or Data Identified Noncompliance Review or any
10 of these other type of reviews in any category, then you're
11 deemed to meet requirements. And one -- one hypothesis as I
12 recall was, well, part of the problem is these targets are
13 really low. And so it's too easy to meet all the requirements.

14 The response to that might be, well, there are only 133 in
15 the entire universe that were deemed to meet requirements that,
16 from CDE's perspective, had meaningful numbers to analyze.

17 On the other hand, maybe that doesn't matter. Maybe --
18 you know, maybe there are some real problems in those schools
19 with suspension rates or something else. But to have a
20 meaningful analysis, I think we need to look at those
21 133 schools. So the question again -- or 133 districts. So
22 the question again is: Do we have the data we would need to
23 conduct that analysis now or is something more needed?

24 **MS. WAGNER:** So of those 496, there were just four
25 that had a census enrollment of students with disabilities

1 above 100, so based on what you were talking about earlier, all
2 but four would fall under this new small count.

3 So in terms of, you said, 132 --

4 **THE COURT:** Well, let me interrupt.

5 Is that right? I mean, we're not cutting off anybody who
6 had -- any district that had fewer than 100 students.

7 **MS. DUNCAN-BECERRIL:** So if they had 30 or more, they
8 would have a dashboard color. They would have a -- for -- and
9 if they had cumulative enrollment greater than 30, which is
10 likely. If they had concurrent enrollment greater than 30,
11 they would have assessment scores. And if they have a census
12 enrollment of greater than 30, they will have scores for all
13 the other indicators. A preschool would be the only exception
14 because you may have 30 students in the whole school but maybe
15 only five in preschool.

16 **THE COURT:** So if we use that cutoff, we're getting
17 much closer to the 133?

18 **MS. DUNCAN-BECERRIL:** Uh-huh. So the -- the census
19 enrollment is a hundred -- is greater than 30. So on
20 December 1st, they had 30 or more students, which is really the
21 lowest number that we would get all year. Concurrent
22 enrollment and cumulative enrollment is typically larger --
23 would be 132.

24 **MS. WAGNER:** So then is your cutoff the census
25 enrollment of 30 or higher to get to that 132?

1 **MS. DUNCAN-BECERRIL:** That's how I got to the 132.

2 That's the -- that is what we applied this year. The hundred
3 that I spoke of earlier is what I think, going forward, if
4 we're going to sort of combine districts together would be the
5 cutoff.

6 And -- and just for clarification, Your Honor, we did not
7 submit yet those districts. We have not completed the 2019,
8 '20 monitoring year. I mean, it's getting there. It's getting
9 super close. But we will -- if they do not have any complaint
10 noncompliance or other kinds of elements, a critical incident
11 review or something that happens, then they wouldn't be
12 reported, but they have not yet been reported.

13 **MR. MLAWER:** Yeah. I think your December submission
14 was very clear. You said that districts could infer a
15 preliminary determination of meets requirements and then if
16 certain things happen, that could change by the time you put it
17 out in the fall.

18 **MS. DUNCAN-BECERRIL:** That is correct.

19 **MR. MLAWER:** Okay. So the 132 -- Susie, can you get
20 to those?

21 **MS. WAGNER:** I get 130 districts that have a census
22 count of higher than 30. And I get 140 of those that have
23 30 or above. So maybe we need to just make sure I'm looking at
24 the right 132.

25 **MS. DUNCAN-BECERRIL:** Certainly.

1 **THE COURT:** So that -- that analysis would be helpful
2 too, that applies to apples analysis.

3 Am I remembering correctly that the issue of improvement
4 from one year to the next does not come into play on the
5 Performance Indicator Review and the Data Identified
6 Noncompliance?

7 **MS. DUNCAN-BECERRIL:** That is correct.

8 **THE COURT:** So I did want to ask -- and we're
9 bouncing around a little bit, but I did want to ask another
10 question about the comprehensive monitoring where -- and the
11 dashboard where year over year does come into play.

12 It seems to me -- so -- so Mark's supplemental report kind
13 of removed the concept of improvement -- getting better or
14 getting worse, removed that concept entirely.

15 **MS. DUNCAN-BECERRIL:** That is correct.

16 **THE COURT:** You've got -- you've got the concept
17 built into your current system. And it's just based on what --
18 a change from one year to the next, and it doesn't matter how
19 big or small the change is, as I recall.

20 **MS. DUNCAN-BECERRIL:** That is correct.

21 **THE COURT:** Okay. It seems to me that as
22 policymakers, you have the leeway to make a decision to
23 include, you know, getting better or getting worse as a factor
24 in identifying which districts to monitor. And I didn't take
25 the supplemental report as suggesting that it wasn't

1 appropriate to take that concept into account in some fashion.
2 It's just for comparative purposes you didn't do it.

3 **MR. MLAWER:** Yes.

4 **THE COURT:** And -- but -- I guess I still -- what I
5 still scratch my head a little bit about is the idea of just
6 doing it one year -- just comparing one year to the next as
7 opposed to potentially multiple years and, also, the idea of
8 not taking into account how much or how little improvement, or
9 how much or little regression took place.

10 **MS. DUNCAN-BECERRIL:** So in the dashboard there is a
11 level of improvement. So you have to improve so many points.
12 I think we talked about this. For suspension you have to go up
13 2 percent in order to change the color.

14 **THE COURT:** Oh, okay. That's right.

15 **MS. DUNCAN-BECERRIL:** If you remember, 2 percent
16 could be, like, 50 kids. So it does take into account that.
17 And that's another something that we can talk about further
18 with other kinds of target. Obviously, we've stated before
19 sometimes one or two students makes a big difference, even at
20 100. So I think there is value in that part of it.

21 In -- in a way, the way that we look at it is building
22 year after year. So you have to continue to improve in order
23 to get the higher score.

24 So if you -- like, you know, you're at 10 year one year
25 and you go to 12, then you get a higher score. And the next

1 time -- the next year, where you start at is 12. You don't
2 start at 10. But if you go back down from 12 to 11, you get a
3 lower score. So in a way it does build off year after year.

4 **MR. MLAWER:** Well, that's true for the dashboard
5 indicators, but the other selection elements in the
6 comprehensive review formula were structured differently, those
7 that included improvement or regression. And some of those led
8 to highly absurd outcomes, which I detail in my January report.

9 So there are two kinds of issues here. One is -- I don't
10 think there is any dispute that improvement and regression --
11 that discretion exists to count improvement or regression. The
12 problem is how to do so.

13 In my January report, I focused on -- that the current
14 approach, both within the dashboard to some extent but
15 certainly outside it, has some absurd consequences.

16 The Morgan Hill plaintiffs focus elsewhere in their
17 amicus, and they focused on the issue of whether a year over
18 year is adequate as opposed to multiple years to judge
19 improvement.

20 So that's how I see these issues.

21 **MS. DUNCAN-BECERRIL:** But in our own indicators,
22 while you may find a district who would get a higher score if
23 they had 30 percent and going from 30 to 32, but would get --
24 another district would get a lower score if they were at 90
25 percent and went from 92 to 90. It's still improvement and

1 getting -- or getting worse. So I think -- and every year it
2 resets to that new place you were last year.

3 **MR. MLAWER:** Right. But the fact remains that when
4 you're awarding either one point or two points or three points
5 or four points, you're inside a process that you're going to
6 judge these districts against each other. You're either above
7 62 or you're not; right? And you get above 62 or below 62 by
8 based on how many points you get.

9 So there is -- there is a competitive thing going on here,
10 and it matters that if you tell a district that has
11 99.1 percent compliant and decline from 99.2 percent that it's
12 going to get one point, and another district that improved from
13 58 to 59 is going to get more points, that just doesn't make
14 sense.

15 **MR. SPENCE:** But the LEA that's in the 90s --
16 (Court reporter clarification.)

17 **MR. SPENCE:** I'm sorry.
18 That LEA that's performing highly that has a slight
19 decrease, are they really in danger of a CR?

20 **MR. MLAWER:** Well, it depends what their other data
21 are. There are multiple elements.

22 **MR. SPENCE:** I guess.

23 **MS. DUNCAN-BECERRIL:** I think when you look at the
24 totality of elements, the districts who are doing very poorly,
25 our three worst performing districts, are districts who are

1 doing poorly for many students across the board year after
2 year, and they are getting worse. So that's where we should be
3 focusing.

4 If you have a district who on their Data Identified
5 Noncompliance goes from 99.1 to 99.2 -- or 99 and they get a
6 one that year versus another district who might get a two, in
7 order to be selected for comprehensive review, they also have
8 to be doing really bad with all of their students, like, across
9 the board.

10 Now, can we implement something similar to the dashboard
11 where you sort of give everyone a color and you go up and down
12 on color? Yes, absolutely. That's something we could do. I
13 don't think it will change necessarily the outcome. Districts
14 are still selected if they do or do not meet the target for
15 Performance Indicator Review. Both districts who did not meet
16 100 percent for Data Identified Noncompliance are selected for
17 review. The question comes into play around -- around
18 comprehensive review selection.

19 And on top of that, doing something similar to what the
20 Monitor describes or putting into quartiles something very
21 similar to what the U.S. Department of Education does when it
22 assigns determinations to the states is that it puts state --
23 it sort of lines up the performance of all states and says:
24 Here is one-third, you get the lowest points. This middle
25 third gets the second lowest. And then this top third gets the

1 highest sets of points. Well, that alone puts states against
2 each other and would put districts against each other.

3 Because, oh, well, you're going to get more points because
4 you're one step above me.

5 It's helpful to look at where they are today, where they
6 were last year, and regardless of where they are in terms of a
7 linear progression compared to other districts.

8 **MR. MLAWER:** Does the U.S. Department of Education
9 approach consider improvement regression in their formula?

10 **MS. DUNCAN-BECERRIL:** I do not believe it does for
11 the purposes of assigning, but there is lots and lots of
12 concerns around the U.S. Department of Education determination.

13 **THE COURT:** Could I ask one more question? I think
14 we should take a break in a minute, but let me just ask one
15 more question about, again, now jumping back to Section 2, the
16 districts that have been deemed to meet requirements.

17 The idea that you have to meet all of your targets, how
18 many targets are there? Like, 24 or something like that?

19 **MS. DUNCAN-BECERRIL:** So there are 16 targets within
20 the annual performance report. There is an additional two for
21 IEPs and triennials. So I -- we could start there.

22 **THE COURT:** And you're only labeled "meets
23 requirements" if you hit the targets on every indicator. Where
24 does that come from? I mean, is that a -- is that a federal
25 law thing? Is that a Department of Education thing? Is

1 that -- or is that just part of your methodology for deciding
2 who -- who fits into what category?

3 **MS. DUNCAN-BECERRIL:** So I -- IDEA says the districts
4 or states consider the size and the methodology. And lots of
5 states -- we have been working through this with some other
6 states in a -- in a process. A lot of states have used only
7 compliance factors for determining, like, whether or not they
8 have on-time IEPs for determining meets requirements. So they
9 found 50 or 60 percent of their LEAs are meets requirements
10 because they don't include performance in their annual
11 determinations.

12 The -- I believe it was in 2013 the U.S. Department of
13 Education encouraged states to begin to implement a process of
14 including performance inside the annual determinations.

15 So we did do that. And we've talked about the annual
16 determinations. I don't know if we want to, like, dig that out
17 of the graveyard, but we started to model that. And the thing
18 that we found concerning is how complicated it became. Because
19 when we talked with special education local plan area directors
20 and school administrators, they felt like, okay, well, if the
21 moon was in Virgo and the tide was high and the temperature was
22 below 73 percent, then we were meets requirements.

23 But -- so we wanted to look at a way to make it really
24 simple. And the way that we looked at it was if you're in an
25 improvement process with us, if you are in a monitoring

1 activity, you're not meeting requirements. And so we started
2 that as the basis for our selection into meets requirements.

3 Now, I think when we start to look at some of these issues
4 around small end sizes, we may find that none of our districts
5 in the State meets requirements. And that's okay, but --

6 **THE COURT:** That's kind of why I asked the question,
7 because we have been focused up till now on -- with respect to
8 this issue on how, you know, the targets may not be
9 sufficiently ambitious, and it sounds like everybody here
10 agrees on that. And so perhaps there is this concern that
11 districts are being labeled as meeting requirements even if
12 they are not doing well at all.

13 On the other hand, though, I mean, with all these
14 different indicators, you know, if there is a blip one year on
15 one of the indicators, does it really make sense from a -- you
16 know, from a qualitative standpoint to label a district as not
17 meeting requirements?

18 I mean, it's not -- I mean, it's sort of simpler and
19 cleaner to have a system like that, but it's not obvious to me
20 that if -- you know, if I'm the superintendent and, you know,
21 there is one little blip on one little indicator of all these
22 indicators, but I'm doing really well on -- you know, on
23 everything else and I'm doing really well overall, that I
24 should be labeled to -- as not meeting requirements.

25 **MS. DUNCAN-BECERRIL:** And that is an ongoing concern

1 that we have had.

2 But I should tell you that a lot of the things that we
3 hear from the Monitor, the plaintiffs, some of the other -- the
4 U.S. Department of Education, is they are not meets
5 requirements, they are not meets requirements.

6 What you can look around -- what I tend to look at in
7 terms of the annual determination is that it's an improvement
8 process. We have the ability to sanction districts, to
9 withhold funds, put special conditions on their grant. If a
10 district is struggling, usually that's not the best option.
11 But what it does is it signals to us the districts that need
12 help and maybe need a higher level of help.

13 So there might be districts who are needs assistance, and
14 it's for one student or for one non-compliant IEP or one
15 instance where a student didn't meet the 60-day timeline. Do
16 we go and then take them out to the, you know --

17 **THE COURT:** Woodshed.

18 **MS. DUNCAN-BECERRIL:** -- the woodshed?

19 No. We go: Can you fix it and make sure it doesn't
20 happen anymore, and next year you won't be there.

21 The sanctions and the -- the heightened levels of, like,
22 fiscal things that happen to districts happen after several
23 years and needs assistance or needs intervention.

24 **THE COURT:** Okay. Why don't we -- why don't we take
25 a break. As I said, I -- we should all plan on this -- this

1 hearing ending at about 1:00 o'clock. And so why don't we take
2 a 15-minute break.

3 We'll resume at 25 minutes after the hour and we'll go
4 until 1:00 o'clock or no later than 1:00 o'clock and then we'll
5 wrap up.

6 (Whereupon there was a recess in the proceedings
7 from 11:08 a.m. until 11:28 a.m.)

8 **THE COURT:** Okay. Before we move on, is there
9 anything that anybody else wants to say, the plaintiffs,
10 anybody, about Section 2 of the report and the meets
11 requirements issue?

12 **MR. KOSKI:** No, Your Honor.

13 **THE COURT:** Okay. So I propose in the interest of
14 time we skip over Section 3 for now and circle back to it if
15 there is time, if anybody feels the need to. And we go to
16 Section 4, which is -- as I recall is Child Find; right?

17 **MR. MLAWER:** Yes. Okay. For Child Find, recall that
18 CDE selected -- I think it was about 38 districts that fell
19 below two standard deviations below -- below the mean.

20 So we looked at the next 70 districts. These are the
21 districts that were between one and a half and two standard
22 deviations below the State identification rate. Those
23 districts contained about 55,000 students who didn't have IEPs.
24 We restricted our analysis to about 30,500 of those kids, kids
25 for whom we had three years of data. And that also knocked out

1 nine other districts. So we have -- we analyzed data about
2 30,000 -- a little over 30,000 kids from 61 districts.

3 So first we looked at academic performance as measured by
4 State assessment. So -- and we focused most -- although we
5 gave you all the data, we focused mostly in our own thinking
6 about three years. Kids below proficient in ELA. This is the
7 first -- the first table on Page 13, or at -- and at level one
8 of below proficient. So we had about 43 percent of these kids
9 in these districts scored below proficient for three years in
10 ELA and about 2,000 below -- at level one in ELA for all three
11 years.

12 On the next page you see a similar table for math. And
13 here the numbers were a little bit higher. Over 6,000 kids
14 below proficient for all three years, and at level one about
15 2600 kids. The 6,000 represented more than half of the kids
16 in -- test takers in these districts for whom we had data for
17 three years.

18 And for both ELA and math, here we had about 4300 kids who
19 were below proficient, both in English Language Arts and in
20 math for three years. At level one, about 12-and-a-half
21 percent of these kids were at level one for three years in
22 both. Okay. So what that said to us is that there are a
23 significant number of kids in these districts with -- who
24 struggle -- who are struggling academically.

25 We then turn to suspension rates, and that table towards

1 the bottom of Page 14 basically shows that suspension of these
2 kids is not really problematic. Not many of these kids seem to
3 be challenged behaviorally.

4 Now, there is a subset of these kids -- we found about
5 15 percent of them, of the 620 kids who are suspended at least
6 a day for all three years or for two of the three years, about
7 15 percent of those kids scored at level one on State
8 assessment, on both State assessments for all three years. So
9 that group of kids may have both academic -- do have some
10 academic struggles and may have academic and behavioral
11 struggles.

12 We then went to the district level and we established --
13 we developed cut scores that are somewhat arbitrary. We used
14 23 percent for ELA and 31 percent for math.

15 Now, we dropped a footnote there to raise questions or to
16 give a statement about what the ideal way would be to do this,
17 which we couldn't do. We only had one year's data, but we
18 worked with what we had. We applied a cut score of
19 4-and-a-half percent for suspension, for the reasons we
20 indicated in -- in the -- in the footnote. That's also rough.
21 It could be because it doesn't -- that was for a -- the low
22 part of the high end of the dashboard for a unified school
23 district. The reason for that is the spreadsheet contained
24 different types of districts. So we wanted one number that
25 would be theoretically at least applicable.

1 A better way to deal with it of course would be to use the
2 suspension rates for the different kinds of districts if we
3 knew exactly what type of district each one of these were.

4 Regardless, we showed in the table that you see towards
5 the -- on the top half of Page 15 how many districts had a
6 percentage of kids scoring at level one for all three years in
7 ELA. Then in math. And percentage suspended for all three
8 years. Based on those targets or cut scores, that would result
9 at these cut scores in the selection of an additional nine
10 districts for ELA, for Child Find monitoring, nine for math,
11 six for both, and one for suspension.

12 If we lowered those cut scores a little bit from 23 to
13 20 percent, from 31 to 28 percent for math, then those numbers
14 would go up a bit. It would be 13 for ELA, 13 for math, and
15 10 for both.

16 So our basic conclusion here is that the data show some
17 amount of academic struggle. The data do not show many of
18 these students having behavioral concerns. And applying these
19 cut scores would result in the selection of additional
20 districts from this bucket of these 70 districts for Child Find
21 monitoring.

22 **THE COURT:** So the primary question I had in my mind
23 when asking you to -- to examine this, and I may not have
24 articulated it very well at the last hearing, but the -- the
25 primary question I had in my mind is, okay, the districts that

1 are -- that are being flagged currently are the districts that
2 are more than two standard deviations below the mean. So there
3 is that universe of districts, and they're -- they're more than
4 two standard deviations below the mean in terms of the
5 percentage of kids who are identified as disabled; right?

6 And then there is the universe of districts between 1.5 --
7 and I sort of pick this arbitrarily, but between 1.5 and two
8 standard deviations.

9 And the question I had was: Are we looking at the right
10 universe? And is the -- is CDE looking at the right universe?
11 And if -- and my hypothesis was -- an unproven hypothesis was
12 that perhaps a lot of those districts who are more than two
13 standard deviations below the mean in terms of the percentage
14 of kids identified as disabled, may be districts that are more
15 affluent or more high performing, and/or high performing, say
16 Marin County or whatever, and the reason they are more than two
17 standard deviations below the mean in terms of identifying
18 students with disabilities is -- is because they have a lot
19 fewer students with disabilities than, you know, a more low
20 income, you know, poorly performing school district.

21 That's a hypothesis. Again, I don't know if -- if it's
22 correct. And so what I wanted to see is a comparison of the
23 universe of districts that are two standard deviations below
24 the mean and the universe of districts, say, one point --
25 between 1.5 and 2.0 and sort of cross-checked against academic

1 performance and/or affluence to see if that hypothesis might
2 hold true to help us perhaps get at whether the wrong districts
3 are being flagged through the methodology of flagging districts
4 that simply go more than two standard deviations below the
5 mean.

6 So the answer to this question -- so my question is: Can
7 we do that comparison? And the answer may be: Your hypothesis
8 is wrong, or that wouldn't be a useful thing to analyze.

9 But that was -- that was what I had in mind when I -- when
10 I asked you all -- when I flagged this issue for further
11 research, and I'm just wondering if the data you collected
12 gives you the ability to analyze that question.

13 **MR. MLAWER:** My understanding is we do not have free
14 and reduced meal data for all the districts; is that correct?

15 **MS. WAGNER:** Right. So I don't have it for any
16 district.

17 **MR. MLAWER:** For any district?

18 **MS. WAGNER:** Yes.

19 **MR. MLAWER:** So we would need those data to answer --

20 **THE COURT:** But academic performance -- performance
21 data you do have.

22 **MR. MLAWER:** Yes, Your Honor.

23 **MS. WAGNER:** For each district, yes.

24 **THE COURT:** And I assume there is -- there is a
25 correlation -- pretty good correlation between performance and

1 affluence in school district.

2 **MS. DUNCAN-BECERRIL:** Typically there is.

3 **MS. WAGNER:** I also don't have the identification
4 rate of each district. I would need that. So I know who those
5 70 are that fall between the 1.5 and 2.0, but I don't have --

6 **THE COURT:** So I don't know -- I don't know if it's
7 necessary to have free and reduced lunch or not. Maybe it
8 would be helpful.

9 But the main thing is just, you know, sort of -- some sort
10 of comparison between the universe of people that they are --
11 universe of districts that they are flagging and, you know, the
12 universe -- a universe of districts that they are not flagging
13 with an examination of performance or -- or affluence or both
14 to test my hypothesis.

15 Now, if you tell me -- if everybody tells me my hypothesis
16 is not worth testing, that there's -- that there's -- there's
17 something really flawed in that, that's perfectly fine, too.

18 But that -- but I'm just -- I'm just telling you what --
19 what I was hoping to look at in this area.

20 **MS. DUNCAN-BECERRIL:** So, your Honor, if you're just
21 looking at the district level, obviously, or were you looking
22 at percent proficient for students without disabilities and
23 percent free and reduced price meal for students without
24 disabilities in those 36 and then also in those 70; is that
25 correct?

1 **THE COURT:** Thirty-six is what?

2 **MS. DUNCAN-BECERRIL:** Greater than two standard
3 deviations.

4 **THE COURT:** Greater than two. Yeah. I mean, I don't
5 know if it was -- it would be all students or students without
6 disabilities. I don't know what the -- I don't know what the
7 right number to look at would be.

8 **MS. DUNCAN-BECERRIL:** So the analysis that the
9 Monitor performed was solely students without disabilities.

10 So one of the things to keep in mind is the Monitor looked
11 at three years of data, is to look -- obviously, we have been
12 talking a little bit about improvement. Are districts
13 improving? This comes to a question also of good quality
14 general education, you know.

15 So there is -- there is a number of reasons why students
16 aren't performing well that may have very little to do with
17 their disability. And so it's hard to kind of -- whether or
18 not they have a disability. So sometimes it's harder to
19 control for that.

20 But if you're just looking at those percentages, I mean,
21 that is possible to do. But when we look at the 70 districts
22 that were included in the analysis, we find that for students
23 without disabilities, the percent not proficient and the
24 percent proficient is -- so there's fewer students not
25 proficient and more students proficient.

1 So the districts are actually getting better year over
2 year in the number of students who are proficient, which
3 indicates to us that there is better, good quality education.

4 **THE COURT:** You mean, there's -- there's greater
5 proficiency in the -- in the group of 70. Proficiency is
6 higher in the group of 70 than It is in the group of 36?

7 **MS. DUNCAN-BECERRIL:** I haven't done that analysis.
8 We only looked at the 70. That was only what was requested
9 from the Monitor. We tried to replicate some of that
10 information. What we found in the 70 is that those districts
11 are getting better year over year for every -- so on their
12 assessment rates. So for students without disabilities. I'm
13 handing you a chart so you can actually see that.

14 (Whereupon document was tendered to the Court.)

15 **THE COURT:** Can we -- before we look at this chart,
16 can we just take a step back and let me ask you: What about my
17 hypothesis? What about -- what about the theory that, you
18 know, some of these districts that are being flagged because
19 they are greater than two standard deviations below the mean
20 are -- simply have a low identification rate because they --
21 there are a lot fewer disabled children in those districts.

22 Because -- you know, and then one way to identify a
23 district that has a lot fewer disabled children is to look at
24 the affluence of the district or the -- or the performance of
25 the district.

1 **MS. DUNCAN-BECERRIL:** Performance might be one way.

2 I mean, I would caution against the affluence because the
3 measurement that we use is free and reduced price meal
4 eligibility. Most affluent parents won't even fill out the
5 form. So -- and -- because they don't think their child will
6 be eligible. So eligibility rates are kind of different for
7 that.

8 And in addition to that, if you have a child -- if you
9 looked at high school districts, they have lower, sometimes,
10 percentages of free and reduced price meal eligibility.
11 Because they are, you know, high school students, they don't
12 want to be on the free lunch program.

13 **THE COURT:** Right. Right.

14 **MS. DUNCAN-BECERRIL:** So it is -- it's the measure --
15 the measure we use is typically the number of students eligible
16 for a free and reduced price meal. But there are some. It's
17 not a perfect measure.

18 **THE COURT:** But isn't -- okay, so -- but is it
19 generally true that the higher performing school districts are
20 more affluent?

21 **MS. WRIGHT:** Yes, they have a lower amount of free
22 and reduced price meals, yes.

23 **MS. DUNCAN-BECERRIL:** Yes. So the better performing
24 districts have fewer students who are eligible for free and
25 reduced price meals.

1 **THE COURT:** And I'm sure if you ran the numbers in
2 those districts based on, you know, income levels, based on
3 census data or something like that, you probably would see also
4 that the higher performing districts are higher income
5 districts.

6 **MS. DUNCAN-BECERRIL:** That is likely. But I don't
7 know if that is necessarily tied to identification rates. You
8 know, a lot --

9 **THE COURT:** Well, that's what I -- yeah, that was
10 going to be my next question.

11 **MS. DUNCAN-BECERRIL:** A lot of -- a lot of, for
12 example, parents in more affluent districts are more likely to
13 refer their own children because they believe that's how their
14 children can get services or supports. There is greater
15 advocacy in terms of like -- I know one affluent district,
16 every IEP has a lawyer at it. And that's just how they
17 function. Like, the parents bring their lawyer.

18 And so -- so I don't know if it's necessarily tied to
19 identification rates. I mean, we wouldn't want to make the
20 assumption that people who are more affluent don't have
21 children with disabilities. That's not necessarily the case.
22 I think -- I would have to look at the districts, those
23 70 districts, but they do also tend to be small. So I'm
24 guessing -- well, we're seeing charters, the average enrollment
25 rate is about 76, so...

1 **THE COURT:** I guess -- I guess my concern, to sort of
2 boil it down to its essence, was if you look at the
3 38 districts that are more than two standard deviations below
4 the mean, are we going to find that a lot of those districts
5 are the high performing more affluent districts? And if so,
6 does that raise questions about whether we have the right
7 selection criteria with respect to Child Find?

8 And that's the -- if you -- if I told you that, you know,
9 the 36 school districts flagged through that selection criteria
10 are all the high performing -- or most of them are the high
11 performing affluent school districts, wouldn't you be concerned
12 that it might not be the right criteria for -- for identifying
13 districts with Child Find problems?

14 **MS. DUNCAN-BECERRIL:** I'd have to look at the data.
15 I wouldn't want to say that -- I -- I don't believe that that's
16 the case, and I can look at the data and we can provide some
17 information about those 36 in terms of the percentage of free
18 and reduced price meal eligible.

19 We tend to sometimes see lower rates within rural
20 districts because there is just less access to quality medical
21 care. There's less access to quality preschool. So that's
22 where we might see lower identification rates. I'd have to
23 look at that 36. But my guess is it's highly tied to where you
24 live and not necessarily the percentage of free and reduced
25 price meal eligibility.

1 **MR. MLAWER:** Do you happen to have a list of the
2 36 with you?

3 **MS. DUNCAN-BECERRIL:** I'm trying to find that right
4 this second.

5 **THE COURT:** Maybe it's as simple as taking a look at
6 the 36 and sort of seeing where they fall on performance and
7 where -- you know, where they fall on affluence. And maybe
8 that doesn't tell -- you know, maybe -- maybe that will tell us
9 nothing, but it was a concern that I have.

10 Mr. Koski, do you have any thoughts on this?

11 **MR. KOSKI:** Yes, Your Honor. There's two things that
12 I would think about in trying to decide whether or not -- or
13 two methodologies I would consider in thinking about whether or
14 not we're using the right Child Find measure here and using the
15 standard deviation cutoff method that we're using right now.
16 So it raises two questions for me.

17 One, is there a meaningful difference between the group
18 that falls -- the question you're asking essentially, whether
19 it's in terms of performance, affluence, whatever measure we're
20 using, is there a meaningful difference between those that are
21 above two standard deviations and those between 1.5 and 2.

22 But I don't want to lose track of what the Monitor did
23 find here, and that is that there is very low performance among
24 those students in the 1.5 to 2 standard deviation range and
25 those -- that may be due to disability, it may be due to

1 something else, as Ms. Becerril says, but we don't know, and
2 that's part of the problem.

3 So that is at least one indication that we might be
4 missing kids who have disabilities. They might not be
5 identified. Performance is a pretty good way to do it --

6 **THE COURT:** So that second point you're making is,
7 that goes to whether they are flagging enough districts.

8 **MR. KOSKI:** Correct.

9 **THE COURT:** The first point goes to whether they are
10 flagging the right districts; right?

11 **MR. KOSKI:** Right. Exactly. So right ones, are we
12 getting enough. And I don't want to lose track of are we
13 getting enough because I think the Monitor does provide some
14 evidence that we might not be getting enough.

15 **THE COURT:** I get that.

16 **MS. DUNCAN-BECERRIL:** I'm looking at the list of
17 25 -- or 36 LEAs that were selected for Child Find, and what
18 I'm finding are rural -- rural districts. Farmersville Unified
19 is a very small district. Modoc Joint Unified is a small
20 district. Magnolia Union is a small district, a rural area.
21 Bitterwater-Tully Elementary is a small district in a rural
22 area.

23 The other ones are also charter schools. So Connecting
24 Waters Charter in East Bay is a charter school. They may have
25 a low percentage of students with disabilities, because their

1 authorizing charter does the Child Find for them.

2 So what I -- what I'm seeing is small districts in rural
3 areas, those 36, or charter schools.

4 **THE COURT:** What about the Dixie school district? Is
5 that in there? It may not be called the Dixie school district
6 anymore. There is a controversy about that.

7 **MS. DUNCAN-BECERRIL:** I did not see the Dixie school
8 district.

9 **MR. MLAWER:** Are there any that fit the profile of --
10 based on what you can tell from a name, of a more affluent
11 district among the 36?

12 **THE COURT:** Like anything from Marin -- does it have
13 the county where they are located?

14 **MS. DUNCAN-BECERRIL:** No. I'm looking at them. I
15 don't see any. What I can do, though is -- what we can do is
16 we can identify the county they come from and look at their
17 total population and we can file that on the docket so you can
18 see that.

19 **THE COURT:** Okay. That would be good.

20 **MR. MLAWER:** Are any from San Mateo County? I'm
21 asking because I think Ms. Armsby has --

22 **MS. DUNCAN-BECERRIL:** I don't have the county. Let
23 me look it up real quick and see if there are.

24 (Brief pause.)

25 **THE COURT:** I forgot Ms. Armsby was here. Do you

1 have -- is there anything you want -- anything you want to add
2 to this discussion?

3 **MS. ARMSBY:** Not at the moment. I don't really think
4 that I -- I don't really have anything much to add.

5 **THE COURT:** Okay.

6 **MS. DUNCAN-BECERRIL:** If we could circle back around.
7 I just have to find the county codes, and that's what I'm
8 struggling with. I'm so sorry.

9 **THE COURT:** Why don't you just -- why don't you just
10 file something on that?

11 **MS. DUNCAN-BECERRIL:** Huh?

12 **THE COURT:** Why don't you file something on that.

13 **MS. DUNCAN-BECERRIL:** We can do that. I'm sorry.

14 **THE COURT:** And that way we can move on. Unless --
15 does anybody -- anybody have anything else on that topic?
16 Child Find?

17 (No response.)

18 **THE COURT:** No? Okay.

19 Do you want to move on to aggregation?

20 **MR. MLAWER:** Sure. We'll turn to disaggregation of
21 data.

22 So we analyzed this issue for three indicators, to LRE
23 indicators, placement in regular classes for less than 40
24 percent of the day, placement in separate programs, and
25 suspension. And we only focused on districts that were --

1 would not have been selected for Performance Indicator Review.

2 For the LRE elements, that means that they met the State
3 target. For the suspension, that means that they were labeled
4 yellow, green, or blue on the suspension dashboard. Because we
5 wanted to try to answer the question as it was posed by the
6 Court about significantly hindering the State's ability to
7 effectively flag districts, so we looked at districts that were
8 not flagged. Okay.

9 So starting with placement for less than -- in regular
10 classes for less than 40 percent. We analyzed this for three
11 different risk ratios, which I believe we explained in a
12 footnote. We went through this a bit at -- earlier on in this
13 case. Compares a target group to a comparison group.

14 So here on -- at a risk ratio of 2-and-a-half, that means
15 two-and-a-half times more likely, we flagged 12 districts, one
16 of which had more than one flag at a risk ratio of two and a
17 half.

18 We also point out that at a risk ratio of 3.0, which is
19 the risk ratio used by CDE for flagging districts for
20 disproportionality review, for the groups that are included in
21 that, the racial and ethnic groups, we found that six districts
22 were flagged here for English language learners at 3.0. Which
23 had English language learners been included, if they were
24 included in disproportionality monitoring, would have resulted
25 in -- in the selection of those six districts. But they are

1 not.

2 So we also then looked at -- and this is the last table in
3 each section -- the extent to which districts flagged at
4 two and a half, 2.5, were selected for comprehensive review,
5 because if you're selected for comprehensive review, then in
6 theory at least this type of issue can be probed for students.
7 And for this -- for this particular indicator, none of these
8 12 districts were selected for comprehensive review.

9 We then moved on to placement in separate programs. Here
10 at 2.5, we flagged 18 districts, two of which had more than one
11 flag, two of those districts.

12 So at that, we then also turned again to 3.0, a risk ratio
13 of three. And there three districts were flagged for -- for
14 kids in foster care. Again, kids who are in foster care are
15 not included in disproportionality monitoring. So if that were
16 not the case, then these districts would have been selected for
17 disproportionality review.

18 Here we turned again to comprehensive review selection and
19 determined that three of the districts that we flagged at
20 2.5 were, in fact, selected by CDE for comprehensive review.
21 And one additional district that was flagged at 2.5 was
22 selected despite scoring above 62 percent by CDE, and you may
23 recall some discussion of that particular district at the last
24 set of hearings. That was a district that scored a little bit
25 above 67, but was selected for -- by CDE for other reasons.

1 Okay. Finally, suspensions. Here -- and we've included
2 tables that show you the flags for the different populations.
3 Here we flagged at 2.5 33 districts, seven of which had more
4 than one -- one flag.

5 At 3.0 eight districts were flagged for kids in foster
6 care, five districts were flagged for kids in poverty or -- in
7 or near poverty, and two for homeless students. The extent to
8 which these 33 districts were selected for comprehensive
9 review, of the 33 at 2.5, four were selected by CDE by its
10 typical means, and an additional -- that additional district
11 was also selected. So that brings the total for five out of
12 the 33 were under -- would be under -- would have, I guess by
13 this point in the school year, undergone comprehensive review.

14 So our overall conclusion is that if this sort of analysis
15 were engaged in, an additional 59 districts would be selected
16 for Performance Indicator Review in these three areas. Eight
17 of these 59 in total were selected by CDE for comprehensive
18 review.

19 So our conclusion is basically that the failure to
20 disaggregate the data hinders the State's ability to flag
21 districts for monitoring.

22 **THE COURT:** Reaction?

23 **MS. DUNCAN-BECERRIL:** So we disagree with the
24 Monitor's analysis. In fact, his analysis for student --
25 districts who are in -- whose (inaudible) students are in a

1 regular classroom, less than 30 percent identified 12 out of
2 13 -- 1,360 LEAs, and 15 --

3 **THE COURT:** Oh, sorry. I -- can you repeat that?

4 **MS. DUNCAN-BECERRIL:** Sure. And I have a -- of
5 course a chart.

6 **THE COURT:** A chart. Are you going to hand out the
7 chart?

8 **MS. DUNCAN-BECERRIL:** Sure.

9 (Whereupon document was tendered to the Court.)

10 **MS. DUNCAN-BECERRIL:** So 12 out of the 1,360 LEAs
11 that were not selected for Performance Indicator Review for
12 students who are in a regular classroom less than 40 percent of
13 the day, 12 of them were flagged. So less than 1 percent,
14 .88 percent.

15 **MR. MLAWER:** Excuse me. Less than 1 percent of what?
16 Of the overall districts --

17 **MS. DUNCAN-BECERRIL:** Students who were not selected
18 for that indicator. So 1,360 LEAs were not selected for PIR
19 for students in a regular classroom less than 40 percent of the
20 day. So the analysis -- my assumption is, and I could be
21 wrong, is that the Monitor states we didn't flag those
22 districts and we should have if we had done this analysis.

23 So of the 1,360 that were not flagged for Performance
24 Indicator Review, he's stating 12 of them should have been.
25 So that's .88 percent, less than 1 percent.

1 Additionally, for students in separate schools, 1 percent
2 of the LEAs. So 15 out of 1,435 should have been flagged. And
3 for suspension, 3.6 percent of the LEAs not flagged, that's
4 27 out of 738.

5 Now, all of these LEAs are participating in some level of
6 monitoring activity. Not necessarily in that area, but in a
7 monitoring activity. So 50 out of 59 of them are
8 disproportionate. And all of them are participating in
9 Performance Indicator Review except one. So, and that one
10 district that's not in Performance Indicator Review is in -- is
11 disproportionate.

12 Now, it is a small number, far below what we would even
13 consider normal error. But I did also look -- I think when we
14 had this initial discussion, the statement was said, "Well,
15 what if they are just not doing very well with that
16 population?"

17 So I went on the dashboard and I found that -- it's harder
18 with least restrictive environment, but of the 12 LEAs that
19 were identified for students in regular class less than 40
20 percent of the day, four of them are in differentiated
21 assistance for students with disabilities, which means they are
22 failing more than two areas for students with disabilities. So
23 they are going through with their county office an intensive
24 root cause analysis to ensure that they are looking at all the
25 areas of special education.

1 And two of the LEAs were flagged for different genus.
2 Those would mean they are doing poorly for EL. And that was
3 the area the Monitor identified them for.

4 Going to separate schools, five of the students in
5 differentiated assistance were in that because of poor outcomes
6 for students with disabilities, meaning they are going through
7 with their county office and a root cause analysis process that
8 includes looking at LRE. And five were in the -- in
9 differentiated assistance for their outcomes for foster
10 children, which was the area the Monitor identified for those
11 five LEAs.

12 It becomes even more apparent when you look at suspension,
13 which does have a comparable -- ability to compare. So of the
14 27 districts the Monitor flags for subgroup suspension, 17 are
15 either red or orange on the dashboard for that subgroup, which
16 indicates to me that it's not an issue of disability that's
17 causing these poor outcomes. It's an issue that -- with that
18 subgroup. So, for example, the Monitor identified 11 LEAs who
19 are more likely to be suspended, who are also foster. However,
20 nine of them, or 81 percent, are read on the dashboard for
21 suspending foster students.

22 **THE COURT:** Regardless of disability?

23 **MS. DUNCAN-BECERRIL:** Regardless of disability. So
24 to me, even though there is -- to me it's a very small number
25 of districts identified. Those -- the issues, it seems to me,

1 is not that they are doing poorly with students with
2 disabilities. It's that that subgroup is struggling within
3 that LEA. And we have methods within our larger accountability
4 system to address that.

5 **MR. MLAWER:** Did those methods include an
6 individualized determination of the extent to which the kids
7 suspended, for example, are receiving FAPE for LRE?

8 **MS. DUNCAN-BECERRIL:** I can't speak -- I can't speak
9 to how foster --

10 **MR. MLAWER:** Is it a special education monitoring
11 process, this differentiating --

12 **MS. DUNCAN-BECERRIL:** Assistance?

13 **MR. MLAWER:** -- assistance?

14 **MS. DUNCAN-BECERRIL:** It is not.

15 **THE COURT:** Thank you.

16 **MS. DUNCAN-BECERRIL:** But the issue may very well not
17 be special education. It may be that the district itself is
18 struggling with this greater population.

19 **MR. MLAWER:** Well, both may be true, but one process
20 has the ability to find a kid who is not receiving FAPE and
21 correct that, find a kid who is not placed in the LRE and
22 correct that, and the other one does not, if I understand you
23 correctly.

24 **MS. DUNCAN-BECERRIL:** That is not how we -- we could
25 separate the two within the analysis.

1 This is simply a risk that one is more likely to be
2 identified or placed in a separate school versus another -- or
3 be suspended. The cause of that risk at this point is unknown,
4 and I don't know how we could know it using the data here.

5 **MR. MLAWER:** Well, no. The point is that if these
6 districts were, in fact, selected for Performance Indicator
7 Review in these particular area, presumably that process would
8 include a special education process that would make such
9 determinations and fix them.

10 **THE COURT:** Okay. I think I understand the issues.
11 Mr. Koski, do you have anything you want to add on this
12 point?

13 **MR. KOSKI:** No, Your Honor.

14 **THE COURT:** Okay. Do you want to circle back briefly
15 to -- I wanted to make sure we had enough time to discuss the
16 other stuff before we got to Section 3. But do you want to
17 briefly circle back to Section 3 of your report?

18 **MS. DUNCAN-BECERRIL:** Your Honor, I was able to look
19 at those 30 districts. The majority of them --

20 **THE COURT:** On Child Find now?

21 **MS. DUNCAN-BECERRIL:** On Child Find, yes.

22 About 17 of them are charter schools, so a little over
23 half. And the rest of them are located in what we could
24 consider very small counties, rural counties. So Imperial,
25 Modoc, San Benito, Siskiyou, Stanislaus, and Tulare.

1 **THE COURT:** Are those the kinds of districts that you
2 would expect to have the biggest Child Find problems?

3 **MS. DUNCAN-BECERRIL:** Those areas? Yes. Because,
4 again, sometimes the rural, the -- makes it more complicated to
5 do Child Find.

6 **MR. MLAWER:** I'm not sure. Do you have a list of the
7 70? Do you think that the 70, between one and a half and two
8 would look similar or would there be differences?

9 **MS. DUNCAN-BECERRIL:** I mean, we could definitely --
10 I mean, obviously I will be filing this information on the
11 docket and we can file that information as well.

12 **MR. MLAWER:** Okay. So just to review, there are
13 three different factors that you pointed to; right? One is
14 being a charter school, one is being rural, and the other is
15 small; is that correct?

16 **MS. DUNCAN-BECERRIL:** Uh-huh.

17 **MR. MLAWER:** Okay. So the interest would be to take
18 a look at the 70 and to see do they also fit a similar pattern?

19 **MS. DUNCAN-BECERRIL:** Uh-huh.

20 **MR. MLAWER:** Great.

21 **THE COURT:** And then does it make you wonder that if
22 you're, you know -- I guess one would assume that like some
23 urban school districts, there -- I guess I'm mildly surprised
24 to see that some urban school district is not on the list of
25 districts that fall more than two standard deviations below the

1 mean. Does that surprise you?

2 **MS. DUNCAN-BECERRIL:** No, actually, it doesn't.
3 Because a lot of times there is a little bit more of a safety
4 net in terms of their -- there's more individuals around the
5 child. So you have access like medical care.

6 Even if it -- let's say -- let's say -- and I don't want
7 to paint with too broad a brush here obviously, but if you have
8 a very urban district that has a very high percentage of free
9 and reduced price meal eligibility, you might find that a
10 number of those children are also on MediCal or Medicaid and so
11 that they are also accessing a set of services that could
12 identify them. They also might be eligible for state
13 preschool, which also could identify them at an earlier age.

14 So there is a little bit more -- I'm not saying it's a one
15 to one match. I'm saying that is what we might see versus in a
16 rural area sometimes you have students who show up for
17 kindergarten on the first day and nobody has really reviewed
18 their -- how their progress is or what their needs are.

19 **THE COURT:** Okay.

20 **MR. MLAWER:** Do you think -- is that because the
21 families may be somewhat disconnected from the services that
22 exist and/or services don't exist? That kind of thing?

23 **MS. WRIGHT:** So I just returned from Del Norte -- a
24 three-day tour of Del Norte County as of last night, and this
25 is actually something that we discussed. And the bottom line

1 is, is that a lot of times it's parental choice and because
2 folks are -- we're talking really rural; that the -- the
3 district and the county and SELPA were doing a really nice job
4 of trying to go out and outreach and some of the children, the
5 preschoolers -- and they have -- they are trying to increase a
6 robust early intervention. Zero to three with the regional
7 centers.

8 The children zero to three are being on a bus two to three
9 hours a day to even get to a location. And so that's really
10 what we're dealing with. It's like a five-hour difference
11 between some of the locations within that one county. And I
12 think some of the same situations occur here.

13 So I don't think it's for lack of trying. I think there
14 are just some situations that come up that are out of the norm.
15 And I think Shiyloh is right in terms of you just have so many
16 more points of contact.

17 And one of the things they talked about in Del Norte was
18 that medical care, the pediatricians -- access to
19 pediatricians, even, is really scant. So they haven't been --
20 even been able to -- the parents are saying that it's really
21 difficult to get medical care for themselves and their kids
22 because of just -- just services in general are really --
23 there's not many.

24 **MR. MLAWER:** Thank you.

25 Okay. Turning to number three, the correlation between

1 suspension and rates of referral to law enforcement. This may
2 be the most straightforward of these five issues, at least in
3 terms of what we discovered.

4 We had ultimately 800 -- data from 896 districts here for
5 analysis. We spent some time describing some of the problems
6 in the data and concluded there that these results should be
7 interpreted with caution. In other words, we're not sure this
8 is correct based -- for the reasons that we stated.

9 Nevertheless, we proceeded with analysis for 817 of these
10 districts that had at least 15 students with disabilities in
11 the OCR, the Office of Civil Rights dataset.

12 We determined that there was a moderate correlation, a
13 correlation of .56 between suspension and referral rates across
14 those 817 districts.

15 So what that means in terms of the issues as we've
16 discussed them in -- in this Court in the past is that CDE's
17 contention that you can use incident and suspensions as a
18 predictor for referrals for law enforcement is -- is correct at
19 this moderate level, the level of moderate correlation.

20 So in other words, if a district is selected for a
21 monitoring process based on suspension rate, assuming what
22 happens next includes looking at these issues, then you would
23 pick up most of these districts.

24 However, there are some outliers, and we tried to -- to
25 lay that out. First, you know, we gave you a table of the

1 correlations of all students with disabilities and certain
2 subpopulations.

3 We then looked at districts that had referral rates above
4 4-and-a-half percent and suspension rates lower than
5 4-and-a-half percent. Again, for all students with
6 disabilities and for these subgroups. That second table on
7 Page 11 shows you those results, that continues on to Page 12.

8 So there is a relatively small number of such districts.
9 We have it at 26 such districts.

10 Then we calculated the average percent of students with
11 law enforcement referrals in those districts, and you see that
12 in the very next table. And we expressed the full range of
13 those 26 districts.

14 However, when you get down to the district level and you
15 look at some of the gaps, nine -- there are nine gaps that are
16 at least 9 percent between suspension and referral. And it's
17 only by analyzing these data that you can get to that sort of
18 conclusion.

19 So in other words, for these particular -- let's take
20 District A in the table at the very bottom of Page 12. For
21 students with disabilities in District A, the referral rate was
22 14 and three quarters, the suspension rate was 1.7. So that's
23 a fairly sizeable difference of a little bit over 13 percent.

24 So it would be only through such a data analysis that you
25 could get to these conclusions and then base monitoring on this

1 sort of data.

2 However, overall there is this moderate level of
3 correlation, so although it would not pick up this sort of
4 thing, in general, suspension rates are predictive of referral
5 rates.

6 Did I express that correctly?

7 **MS. WAGNER:** Yes.

8 **MR. MLAWER:** Okay. Thank you.

9 **THE COURT:** Okay. It sounds like we might be able to
10 wrap up a little early.

11 But, Mark, I wanted to ask you, are there any particularly
12 important issues that you didn't get to address the last time
13 we were here? I have a vague recollection that we may have cut
14 off before we got through the entire list, and I don't think
15 it's necessary to go through everything, but is there any -- is
16 there anything particularly important that you want to address
17 that you didn't get a chance to address last time?

18 **MR. MLAWER:** Yeah. There are a couple of things.
19 I'll just -- on the meets requirements districts, that was the
20 very last section of my January report. And I included a
21 number of tables in there that the Court may want to look at
22 again, although we have -- in this additional analysis, we've
23 unpacked that somewhat for at least a couple of issues. I
24 don't think it's worth our time now me going through it.

25 I do think that what we did not do -- with the exception

1 of preschool review and comprehensive review, we did not go
2 through the selection process for any of the monitoring -- the
3 specific monitoring processes. I think, though, we have
4 covered a lot of the issues. So maybe I can just do this in
5 the briefest possible way.

6 Performance Indicator Review. My conclusion was
7 non-compliant. This is, by the way, on Pages 43 to 46 of my
8 report. Based on insufficient data analysis and some
9 inadequate targets. And I include a table that starts on
10 Page 45 that captures that.

11 One aspect -- I said it was unclear whether preschool
12 placements and preschool performance were included. We have
13 clarified that, that preschool LRE is included in Performance
14 Indicator Review. CDE responded, and we had a bit of a
15 discussion about that issue last time. Preschool performance,
16 preschool outcomes is not included in Performance Indicator
17 Review.

18 So some of these issues concerning data analysis and
19 targets, we have covered in other ways and CDE has told us that
20 it will be engaging in a process beginning in the fall to look
21 again at its targets and determine their adequacy and set new
22 targets, if I understood it correctly.

23 So I don't think much discussion is necessary there, and
24 we've dealt with the disaggregation issue as specifically
25 applicable here.

1 Data Identified Noncompliance. I concluded compliance.
2 Plaintiffs stated in their response their agreement with that.
3 CDE did not address it, but I'm going to be quite surprised,
4 Mr. Spence, if you tell me you disagree with that finding.

5 **MR. SPENCE:** We agree with it a hundred percent.

6 **MR. MLAWER:** All right. Now, disproportionality
7 review, I concluded non-compliant here, but that was only
8 because of the two faulty formulas. CDE has stated, and we
9 discussed, I think, at the April 29th hearing that those
10 formulas would be corrected and applied next school year. So
11 I think that will take care of that one.

12 Significant disproportionality review. I deferred that
13 for two reasons. One was the formulas; that's taken care of.
14 The second is the reasonable progress definition, which is
15 outstanding and is referred to a stakeholder group. So I think
16 we're simply waiting for more information from CDE about what
17 that definition will be. And I think, although I didn't
18 capture it in my notes, plaintiffs may have asked here for a
19 deadline for this. I don't recall. It's been a while since I
20 read your March submission.

21 **MS. DUNCAN-BECERRIL:** I can actually chime in on that
22 if it's helpful for us to put it on the record.

23 We have to do this. So the change in the regulation
24 requires us to do a -- for this upcoming year to use the new
25 method for significant disproportionality, including reasonable

1 progress. So we will have to work with our stakeholder group
2 to finalize that this summer. Because in order for us to do
3 significant disproportionality on the data this fall, we have
4 to have that set. So it will be set.

5 **MR. MLAWER:** I see. So your intention would be to
6 file something on the docket after it is set and tell us what
7 that is?

8 **MS. DUNCAN-BECERRIL:** Absolutely.

9 **MR. MLAWER:** Okay. That, I guess would --

10 **THE COURT:** That sort of begs the question of what
11 sort of process we're going to have going forward. It may not
12 be necessary to file something on the docket when they have it.
13 It may make more sense to just address it when we come back,
14 you know, to take another crack at getting us past Phase 2.
15 But we can talk about that a little bit.

16 **MR. MLAWER:** Okay. And, finally, non-public school
17 monitoring. Now, there was a document that was filed by CDE
18 that was an instrument that governed non-public monitoring, and
19 it called -- this is the monitoring of NPSs, non-public
20 schools. It had four different types of reviews, as check
21 boxes on the first page. "Validation," "On Site," "Follow-up,"
22 and a box that was called "Other." It was established at
23 Phase 1 that the school the student attends is -- are data
24 collected by CDE. CDE's December submission did not provide
25 any information about this. So I raised the question of are

1 data being used for the selection of non-public schools for
2 monitoring, and if not, why not.

3 The response that was offered by CDE was that these are on
4 a three-year cycle. That monitoring is on a three-year. So
5 each of these facilities, if I understood that correctly, is
6 monitored every three years regardless of what data may say
7 about what's going on in those schools; is that correct?

8 **MS. DUNCAN-BECERRIL:** I believe that they are
9 monitored annually, but the monitoring may be different. So
10 they have an on-site monitoring review every three years.

11 **MR. MLAWER:** But something else happens?

12 **MS. DUNCAN-BECERRIL:** They are recertified every
13 year.

14 **MR. MLAWER:** And what is involved in recertification?

15 **MS. DUNCAN-BECERRIL:** So I am -- I am not in charge
16 of that, but we do have the -- the person in charge of our
17 non-public schools unit here today who can come and speak to
18 what involves -- I mean, obviously, the selection is cyclical.
19 So if we're talking about selection, that is how it is done.
20 Every year a district -- a set of districts comes up for an
21 on-site review.

22 When they are not in on-site review, they are either doing
23 follow-ups or I believe there is a desk audit. But the actual
24 activities, I think that is a Phase 3 thing, but we can
25 speak -- we have the director -- or the manager of the

1 non-public schools unit here.

2 **MR. MLAWER:** Yeah, we were -- I was thinking only of
3 selection for Phase 2.

4 **MS. DUNCAN-BECERRIL:** So selection is cyclical.

5 **MR. MLAWER:** So every three years, regardless of what
6 data may say about the particular facilities; is that correct?

7 **MS. DUNCAN-BECERRIL:** I think the only exception
8 would be is if there was another -- a critical incident that
9 occurred at that site.

10 **MR. MLAWER:** And a critical incident is what? A
11 Behavior Emergency Report being filed about a student in a
12 facility, would that be a critical incident?

13 **MS. DUNCAN-BECERRIL:** No. So a critical incident --
14 do you want to speak?

15 **MS. WEDIN:** Yeah. So a critical incident can come to
16 our attention in a couple different ways. Somebody can file a
17 complaint, and if we feel it's warranted, we could do an
18 on-site investigation, which would constitute basically a
19 review.

20 Other incidents have -- have arised in the media. So if
21 we learn something through the media that something awful has
22 happened with a student in an non-public school, we can send
23 out a team and do a review that way.

24 So as things come to your attention outside of the
25 cyclical review, if we feel that it warrants our attention, we

1 will send out a team and do a review at that point.

2 **MR. MLAWER:** So does that mean that if a complaint is
3 filed on behalf of a student or a group of students at one of
4 these facilities, that automatically results in what you're
5 describing or only sometimes that happens?

6 **MS. WEDIN:** I believe it's only sometimes that it
7 actually warrants an on-site review.

8 **MR. MLAWER:** Okay. And are there a set of standards
9 that would govern when you do on-site versus when you do not?

10 **MS. DUNCAN-BECERRIL:** Can we have a moment?
11 (Discussion held off the record amongst the
12 Policymakers.)

13 **MS. DUNCAN-BECERRIL:** So I think we need to bring
14 up -- we keep looking back --

15 **THE COURT:** I mean, I was actually going to cast a
16 vote for sort of circling back to this next time.

17 **MS. WRIGHT:** We can get in the weeds on this easily.

18 **THE COURT:** Yeah. Why don't we do that? Why don't
19 we move to sort of the process?

20 **MS. DUNCAN-BECERRIL:** Your Honor?

21 **THE COURT:** Yes.

22 **MS. DUNCAN-BECERRIL:** Can I just circle back around
23 to the Office of Civil Rights data?

24 I just -- I'm not sure -- sometimes it's -- this sometimes
25 feels like a poker game. I'm never sure how -- like,

1 everyone's hands and stuff, but I just --

2 **THE COURT:** I don't think you need to worry about
3 that.

4 **MS. DUNCAN-BECERRIL:** Okay. I just want to make sure
5 because there are a lot of concerns with that data, and if
6 ordered to use it, then we should bring it up.

7 **THE COURT:** I don't think you need to worry about
8 that.

9 **MS. DUNCAN-BECERRIL:** Okay.

10 **THE COURT:** So what -- have you all given some
11 thought to what I said about, you know, I think that where this
12 is going is there will be a ruling from me saying, you know, we
13 need to sort of press the reset button on data analysis and
14 there is just too much that needs to be done to get past this
15 phase.

16 I'm actually not sure anybody in the room would disagree
17 with that point, but what -- assuming I do that, when -- A,
18 when is the right time to come back on Phase 2? And I assume
19 what it would involve is maybe the State initially making a
20 filing that says, okay, here is what we're doing now. You
21 know, you said we were not in compliance on data analysis in a
22 variety of ways. Here is what -- here is what we are -- either
23 have changed or are in the process of changing. Right? And
24 then we would maybe get a response from the Monitor and the
25 plaintiffs and we would come back here again and go through it.

1 And so the question is: When is the right time to do
2 that?

3 And then what -- you know, should we be doing anything on
4 the Phase 3 issues in the -- in the meantime? On that last
5 point, I think the answer is probably no, but I'm open to
6 suggestions or thoughts.

7 **MR. SPENCE:** Your Honor, obviously we would like to
8 move the process along as fast as possible. I think you're in
9 agreement with that. But I think we're going to need to see
10 your order to know the extent of the problems that you have
11 identified or will potentially identify. So we can't really
12 give you an intelligent answer about that until we see that.

13 **THE COURT:** Okay.

14 **MR. SPENCE:** But it's been -- Shiyloh has mentioned
15 to me, and I'll let her speak.

16 **MS. DUNCAN-BECERRIL:** I think one of the concerns
17 that we had in the previous period was the desire to have
18 evidence; right? The lists of districts, which ones were
19 picked for what things. And that was really difficult for us
20 to do with a December deadline last time. Because I think that
21 our filing was due on the 9th, and the dashboard data didn't
22 publish until the 7th. And so we were -- I mean, I had staff
23 late working on that to try. And we still had some errors that
24 we had to clean up and refile and things like that that the
25 Monitor identified.

1 So I think if at all possible, my suggestion would be the
2 earliest would be late January, early February so that we could
3 do a filing based on how the order and what you see as the
4 needs of the Court to make changes to our data analysis,
5 implement them, see if there is anything that comes from this,
6 like the small charter school thing. I think that -- you know,
7 that thing came up this year once we ran the data. And then
8 file.

9 **THE COURT:** So the idea would be to file something in
10 January?

11 **MS. DUNCAN-BECERRIL:** Late January.

12 **THE COURT:** Okay. So that's -- that's fine with me.
13 What I want to emphasize, though, is that, and I'm guessing you
14 probably already know this based on my Phase 1 ruling and my
15 general comments in -- throughout these proceedings. But, you
16 know, what you will not get from me and what I think would be
17 inappropriate for a federal judge to give to you is, you know,
18 specific prescriptions on how you should do X, Y and Z; right?
19 My job is to identify the areas where you're not meeting
20 some -- where you're not meeting a floor and how to meet -- how
21 to get -- how to meet the floor. You know, what to implement
22 to get past the floor is sort of up to you. And so I just want
23 to make that very clear.

24 **MS. DUNCAN-BECERRIL:** I completely understand that.

25 **THE COURT:** Yeah. Okay. So -- and then what

1 about -- what about the issue of whether we need to be
2 looking -- I mean, I assume that the changes that are going to
3 be -- that we all know are going to be made in the coming
4 months on data analysis may well affect, you know, sort of the
5 way monitoring is actually conducted.

6 And so that's why I keep saying that I -- I doubt it makes
7 sense for this proceeding to move on to Phase 3 in any way at
8 this point; that we ought to -- really ought to nail down
9 Phase 2. And maybe we can figure out a way to accelerate the
10 process on Phase 3, you know, depending on where we are after
11 Phase 2.

12 **MR. SPENCE:** We agree -- sorry to interrupt.

13 **THE COURT:** No, that's okay.

14 **MR. SPENCE:** We agree it makes sense to get Phase 2
15 nailed down before we move to Phase 3 because, as you
16 mentioned, that affects what we do.

17 **THE COURT:** Okay.

18 **MS. DUNCAN-BECERRIL:** Oh.

19 **MR. SPENCE:** Do you disagree?

20 **MS. DUNCAN-BECERRIL:** No, I agree completely with
21 that.

22 One thing we may want to -- and I sort of have been
23 prodding lawyers about this, is we could circle back around to
24 the issue of IEP implementation. I think that we are -- there
25 are some places where we're struggling and would -- not

1 necessarily where we're saying should we do it this way. We
2 are asking ourselves: Should we do it this way? Should we do
3 it that way?

4 But helping us understand what some of the expectations or
5 what is good practice or ideas that -- and thoughts that people
6 have because we don't want to bring something forward that
7 would be dead on arrival.

8 So I think that would be really important. And if we
9 could do that --

10 **THE COURT:** As part of this same, on the same
11 timeline?

12 **MS. DUNCAN-BECERRIL:** We could do it, or potentially
13 before. We need to be able -- if we're going to start
14 collecting that in 2021, we need to start getting the
15 specifications set really soon.

16 **THE COURT:** Okay. So in other words, you would like
17 to seek -- you would like to kind of get a clean bill of health
18 on -- clean bill of legal health on IEP implementation much
19 sooner than the tail end of the process. Like this year or
20 something like that?

21 **MS. DUNCAN-BECERRIL:** Yeah. I think we would need --
22 this summer would be awesome. I mean, and it doesn't have to
23 be a huge formal setting.

24 I mean, I don't understand the process. I'm sorry. But
25 maybe, I think, like a case conference. Is that what that is?

1 **THE COURT:** Case management conference, status
2 conference.

3 **MS. DUNCAN-BECERRIL:** Yes. In a place where we could
4 have more discussion about, like, here are some things that
5 we're thinking, just to move forward.

6 **THE COURT:** Yes. And my suggestion -- I mean, I
7 would be happy to be involved, but, you know, my suggestion is
8 maybe you have a meeting or two with the plaintiffs and perhaps
9 the Monitor kind of on your own and start the process of
10 working through those issues and then, you know, kind of -- and
11 then we can -- and then you can bring me in at the tail end of
12 that. That's what I would suggest.

13 **MR. SPENCE:** It may make more sense to have it off
14 the record so that there could be more frank discussion and
15 more -- so I think that would be consistent with what you're
16 suggesting.

17 **MR. MLAWER:** Can I just ask one clarification?
18 The -- you're referring to -- and, Shiyloh, I guess this
19 question is for you.

20 Were you referring to the Phase 1 aspects, collecting the
21 data, or were you also including in Phase 2 aspects the
22 analysis of the data and the use of those data for selection
23 for monitoring purposes? How far were you going?

24 **MS. DUNCAN-BECERRIL:** I think -- I think there needs
25 to be a little bit of both, because here is where we struggle.

1 So we have the indicators, and the U.S. Department of Education
2 says this is how you calculate least restrictive environment.
3 So we can then backtrack from that a way to collect the data.
4 Right now we don't have what that would look like. And there's
5 a lot of questions that are coming up.

6 Like, a student misses a service because they are sick or
7 a parent thinks they don't like the services and those
8 services -- so there are so many things that we're sort of
9 like, okay, do we ding a district? Do we not? What does it
10 look like? What does that calculation look like?

11 I have a lot of statistical ways that I'm looking at it,
12 but I want to make sure that we are going to be able to collect
13 what we can analyze and that we analyze the right thing to get
14 at the right place.

15 And we -- you know, CDE doesn't often have that
16 opportunity. Sometimes we are just like, do it this way and
17 quickly.

18 **MR. MLAWER:** I can make one preliminary suggestion.
19 The parties at one time when they agreed on the RSIP, the
20 corrective action plan for the district included several
21 requirements in there for measuring service delivery, which I
22 monitored for many, many years, so some of these issues like
23 the student absence issue we resolved a long time ago by simply
24 saying if the student is absent, the student is not available
25 for services that day. We tried to keep it as simple as

1 possible.

2 There were other issues around frequency of service, where
3 CDE made clear to me in the midst of the RSIP monitoring at
4 least a decade ago, that in CDE's view -- and they were
5 correct, you folks were correct about this -- I was monitoring
6 it incorrectly, because I was not looking for frequency. In
7 other words, if an IEP said student gets speech therapy three
8 times a week for 20 minutes each time, that's -- that's how CDE
9 monitored it at that time. I assume when you're in
10 comprehensive review, for example, you're doing it the same way
11 now, which is the proper way to do it.

12 However, what I was confronted with when I began this in
13 2003 were just such awful numbers in Ravenswood that it would
14 have been -- nothing would have been accomplished by me
15 monitoring that way.

16 So instead with that example, if I saw that the student
17 received the 60 minutes during the course of that week, which
18 could have been in two 30-minute increments, I marked it
19 compliant because my reasoning was the kid got the service. If
20 I mark it non-compliant when the kid got the service, then all
21 of a sudden Ms. Armsby's client is overwhelmed by comp ed, and
22 it's not easy to determine what -- is comp ed appropriate in
23 such a circumstance.

24 So there are dilemmas like that come up when you're
25 looking at --

1 **MS. DUNCAN-BECERRIL:** Those are some of the things
2 that we are struggling with. And Ravenswood has 300
3 students --

4 **MR. MLAWER:** That's right.

5 **MS. DUNCAN-BECERRIL:** -- with services. We are
6 looking at 800,000-plus students, and last year we collected a
7 potential of 3 million services. So it doesn't just become an
8 issue of checking the box or entering the data.

9 Now, if -- you know, we ran into some concerns about
10 labor. So if a -- if you're now requesting that a teacher
11 enter data in this manner, then that becomes a labor issue.
12 And so these are some of the things that we're struggling with.

13 **THE COURT:** So the upshot, it sounds like, is that
14 you want to -- before you make a submission in which you
15 attempt to establish compliance on this issue that I held you
16 out of compliance on last time, you would like to have a status
17 conference, off-the-record status conference where we can kind
18 of bounce ideas around. No guarantees, no -- you know, no
19 stamp of approval, before at least sort of make sure everybody
20 is on the same page on the issues that you're tackling.
21 That -- I'm perfectly fine to do that as long as it's clear
22 that, you know, you're not getting any formal green light from
23 me on anything. It's just me facilitating discussions among
24 you all to make sure that you're focused on the right issues as
25 you go forward.

1 **MR. SPENCE:** Yes, Your Honor.

2 Also it's our understanding that we're not advocating or
3 delegating our responsibilities to come up with policy to
4 either the Monitor or the plaintiffs, but we do appreciate
5 hearing their -- their concerns, because there have been other
6 times where they have raised valid concerns that have provoked
7 discussion amongst ourselves.

8 **THE COURT:** So working -- let's work backwards.

9 First of all, when would you like to get together with me
10 and the plaintiffs and the Monitor on that issue? And then you
11 can maybe have some meetings before that amongst yourselves.

12 What are you laughing about, Mr. Koski?

13 **MS. DUNCAN-BECERRIL:** He's looking at me like --

14 **MR. KOSKI:** Nothing, Your Honor. Sometimes we have
15 some decent ideas over here.

16 **MS. DUNCAN-BECERRIL:** Well, I mean, I think one of
17 the things that's happened in this case, and that may
18 contribute to some of the sort of Frankenstein nature, is,
19 like, how about this? How about this? And we want to sort of
20 really be proactive and thoughtful. Because it wasn't under
21 our watch that that occurred. And so now it's like, okay,
22 let's -- there maybe needs to be a set of resetting.

23 If we could meet within June and July with the Monitor and
24 plaintiffs and then perhaps in August schedule some time with
25 you for an informal case conference?

1 **THE COURT:** Sure. Sure. And you can decide, I
2 think, for these formal things all of you all, you know, come
3 here and you bring lots of people with you and stuff. I mean,
4 this can be -- you know, you don't all have to be here for
5 that. You can decide who should be there -- who should be here
6 for that.

7 My calendar is a little bit sketchy in August. A couple
8 of dates that are jumping out. One is August 7th, and another
9 is August 21st. And then --

10 **MS. DUNCAN-BECERRIL:** The 21st is best for us.

11 **THE COURT:** And also the last week of August, the
12 week of August 26th probably do like, you know, the 28th or the
13 30th.

14 **MS. DUNCAN-BECERRIL:** Just the 21st would be best for
15 us.

16 **THE COURT:** Okay.

17 **MS. DUNCAN-BECERRIL:** The 28th is probably okay as
18 well. The 30th is -- that's the weekend before Labor Day.

19 **THE COURT:** Oh, yeah. Right. Right.

20 If we're deciding between the 21st and the 28th and if it
21 doesn't matter too much for you, my preference would be the
22 28th.

23 **MS. DUNCAN-BECERRIL:** Okay.

24 **THE COURT:** I think I will have -- because I will
25 just be -- on the 21st I will just be coming back from

1 vacation, and I will probably not have had time to drill down
2 too much on it yet.

3 **MS. DUNCAN-BECERRIL:** Okay.

4 **THE COURT:** So the 28th, why don't we say -- I mean,
5 I have stuff in the morning. So we could schedule it for the
6 afternoon or I could -- if it's easier for you, since you all
7 are coming down from Sacramento, I can move my stuff that's
8 currently scheduled in the morning to the afternoon and have
9 you come in the morning.

10 **MS. DUNCAN-BECERRIL:** I mean, that's kind of better
11 for us just for traffic-wise.

12 **THE COURT:** That's what I figured, yeah. So why
13 don't we do 9:30 a.m. on the 28th. And I'll ask Kristen to
14 move -- Kristen Melen to move the morning stuff to the
15 afternoon.

16 **MS. DUNCAN-BECERRIL:** Thank you.

17 We can schedule meetings with the Monitor and the
18 plaintiff virtually, if that's okay, or --

19 **THE COURT:** Yeah. Why don't you -- that sounds
20 great. Why don't you do that and --

21 **MR. MLAWER:** We can do conference calls, you mean?

22 **MS. DUNCAN-BECERRIL:** Yeah. Like Zoom calls, video
23 conferencing.

24 **THE COURT:** I would suggest you schedule, like, two
25 calls before we have this August thing, at least, you know,

1 have two meetings where you start hashing out the stuff. And
2 no written submissions before -- well, I mean, it may be useful
3 to submit something, you know, a week in advance just for me to
4 absorb in advance. But I'm not going to require it. If you
5 all just want to meet, that's fine too.

6 **MR. MLAWER:** It's possible, you know, if I think
7 optimistically, that the parties will reach some sort of
8 consensus around a couple of good options and the document
9 that's filed could conceivably be filed by both parties and be
10 a consensus statement of what the options are. That's the most
11 optimistic possibility, I think. And maybe it's realistic. I
12 think that's a look of skepticism coming from Mr. Koski.

13 **MR. KOSKI:** That's optimistic.

14 **THE COURT:** All right. Sounds good. So we'll -- so
15 you all work on that. I will work on a Phase 2 ruling. We can
16 sort of -- we will kind of tentatively plan on coming back on
17 Phase 2 with a written submission from the State sometime in
18 late January and which I assume means that we will all get
19 together, you know, in the spring of 2020 on Phase 2 again.

20 But yeah. It will be nice to at least get a little bit of
21 work done in the interim on this remaining -- this leftover
22 Phase 1 issue.

23 Okay. Thank you very much.

24 (Proceedings adjourned.)
25

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, June 21, 2019